Petition

81-501

Office - Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No.

HONORABLE WILLIAM D. BONTRAGER, JUDGE OF THE ELKHART SUPERIOR COURT NO. 2,

Petitioner,

vs.

SUPREME COURT OF INDIANA, AND STATE OF INDIANA, AND HARRY FRED PALMER, III,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a trial judge may be held in indirect criminal contempt of an appellate court where, on remand from an initial unauthorized criminal sentence, a sixty day continuance of a sentencing hearing is granted to a criminal defendant to provide him with the due process right to present evidence and raise an issue as to whether imprisonment, after placement on probation and rehabilitation, would be unconstitutional or otherwise manifestly unjust?

2. Whether a trial judge may be held in indirect criminal contempt of an appellate court where, on remand from an initial unauthorized criminal sentence, and at the prosecutor's request, the trial judge recuses himself in a criminal case in which his impartiality might reasonably be questioned?

3. Whether the evidence sustains a finding of indirect criminal contempt of a trial judge who acts in a manner intended to accord a criminal defendant due process in a sentencing hearing after remand from an initial unauthorized sentence?

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No.

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Petitioner,

vs.

SUPREME COURT OF INDIANA, AND STATE OF INDIANA, AND HARRY FRED PALMER, III,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

Honorable William D. Bontrager, Judge of the Elkhart Superior Court No. 2, prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Indiana entered on March 31, 1981.

OPINION BELOW

The opinion of the Supreme Court of Indiana, entered on March 31, 1981, is reported at 418 N.E.2d 530 (Ind. 1981) and is set out in the Appendix at A2. The notice and order from the Supreme Court of Indiana denying rehearing and reconsideration is unpublished but appears in the Appendix at A1.

JURISDICTION

The judgment and opinion of the Supreme Court of Indiana was entered on March 31, 1981. Thereafter, on June 17, 1981, the Supreme Court of Indiana denied a timely petition for rehearing and reconsideration. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3), the timeliness of the petition being governed by 28 U.S.C. §2101(c) and Rules 20.2 and 20.4 of the Revised Rules of the Supreme Court of the United States.

Cases which support the jurisdiction of this Court are *Ex Parte Chetwood*, 165 U.S. 443, 461-462 (1897); *In re Watts*, 190 U.S. 1 (1903); and *Bessette v. W. B. Conkey Co.*, 194 U.S. 324, 334 (1904).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Eighth Amendment and the first section of the Fourteenth Amendment to the Constitution of the United States as well as Article 1, §§12, 16 and 18 of the Constitution of Indiana which are set forth in the Appendix, A 69.

The statutes involved in this case are IC 35-13-4-4(a) (Burns 1975), IC 35-7-1-1 (Burns 1975) and IC 35-50-2-2(a)(2) (1977 ed.), IC 35-8-1A-2 and IC 35-8-1A-3, all of which are set forth in the Appendix, A 70-72.

The Indiana Code of Judicial Conduct, Canon 3(C)(1)(a), is also involved in this case and is set forth in the Appendix, A 72.

STATEMENT OF THE CASE

This case started as a contempt matter on January 30, 1981, when the Supreme Court of Indiana in *Palmer v. State*, 415 N.E.2d 707 (Ind. 1981), issued a written opinion (A16) concurrently with an Order (A15) which ordered the Honorable William D. Bontrager ("Judge Bontrager"), regular Judge of Elkhart Superior Court No. 2, and Special Judge Richard H. Sproull ("Special Judge Sproull") to personally appear before the Supreme Court of Indiana on February 25, 1981, to show cause why they should not be held in indirect criminal contempt[1] of the Supreme Court of Indiana. The contempt action developed as a result of Judge Bontrager's actions in (a) granting Harry Fred Palmer, III, a criminal defendant, a sixty day continuance of a sentencing hearing in order to provide Palmer with the due process right to present evidence and raise an issue as to whether imprisonment, after placement on probation and rehabilitation, would be unconstitutional or otherwise manifestly unjust, and (b) recusing himself at the prosecutor's request in Palmer's criminal case in which his impartiality might reasonably be questioned, all after remand from an initial unauthorized criminal sentence.

Initially, on September 12, 1977, Harry Fred Palmer, III ("Palmer") was charged with first degree burglary under IC 35-13-4-4 (Burns 1975). Under IC 35-7-1-1 (Burns 1975), at the time of the commission of the crime (September 3, 1977) first degree burglary was one of several designated crimes for which the sentencing court was prohibited by statute from (a) suspending the mandatory indeterminate sentence of not less than ten years nor more than twenty years imprisonment, and (b) placing the defendant on probation. However, on October 1, 1977, the new penal code went into effect which changed the penalties and the provisions for first degree burglary to that of a suspendable

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[1]The Supreme Court of Indiana recognizes that an indirect criminal contempt proceeding is *not* a criminal case. *Dale v. State*, 198 Ind. 110, 120-121 (1926); *State of Indiana v. Shumaker*, 200 Ind. 623, 693, 157 N.E. 769, 162 N.E. 441 (1927).

determinate sentence of not less than six years nor more than ten years imprisonment, absent aggravating circumstances which would enhance the term of imprisonment. IC 35-50-2-2 and IC 35-50-2-5.

On January 16, 1978, Palmer withdrew his plea of not guilty and entered a plea of guilty to the charge of first degree burglary before Judge Bontrager. Thereafter, on February 13, 1978, Judge Bontrager found Palmer guilty of first degree burglary, entered a judgment of conviction against him for said offense and sentenced Palmer to the custody and control of the Department of Corrections of the State of Indiana for not less than ten nor more than twenty years, and further ordered that Palmer be disfranchised and rendered incapable of holding any office of trust or profit during the term of such incarceration, and further ordered that Palmer receive 159 days credit for time served prior to disposition of the proceedings (A49). Upon Palmer's request for consideration of probation, Judge Bontrager determined that even though the statute, IC 35-7-1-1, then provided that the sentence shall not be suspendable for the crime of first degree burglary, he would nevertheless suspend Palmer's sentence because of a determination that the statute was unconstitutional. Accordingly, Judge Bontrager made a finding that the interest of society did not demand that Palmer suffer the full penalty imposed by law in this case and provided that Palmer serve 205 days under the jurisdiction of the Department of Corrections, receive credit for any time already served[2] and that afterward Palmer be released on probation for a period of five years under conditions to be established by the Probation Department (A49-50, A28-29).

Judge Bontrager's determination that IC 35-7-1-1 regarding the nonsuspendability of certain offenses,

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[2]The Order of Commitment entered by Judge Bontrager on February 13, 1978, provided for Palmer's commitment to the Department of Corrections of the State of Indiana to a date certain, namely September 6, 1978. (A49-50).

including first degree burglary, was unconstitutional, was explained in a Memorandum Opinion Denying The State's Motion To Correct Error.[3] Subsequently, the Supreme Court of Indiana in *State v. Palmer*, 386 N.E.2d 946 (Ind. 1979),[4] held, *inter alia*, that IC 35-7-1-1 (Burns 1975) which restricts courts' discretion in suspending sentences for certain offenses was constitutional and that:

> "The penalties and provisions for probation under the old law, in effect at that time, were applicable to this cause and not the new sentences and probationary provisions that were provided for at an effective date subsequent to the commission of the act, but prior to sentencing."
>
> 386 N.E.2d at 950.

The Court then concluded its opinion, ordering that:

> "We accordingly hold that the trial court had no authority to enter an order suspending Palmer's sentence and was limited to sentencing the defendant under the provisions of the old code which were applicable at that time. The cause is accordingly remanded to the trial court with instructions to modify its judgment consistent with this opinion."
>
> 386 N.E.2d at 950.

On June 8, 1979, Judge Bontrager received a certified copy of the Opinion of the Supreme Court of the State of Indiana entered in *State v. Palmer, supra*, and set the matter for "further proceedings" on June 18, 1979.[5] At the June 18, 1979 hearing, David Stutsman, Esquire, a member of the Public Defender staff of the Elkhart Superior Court No. 2, appeared on behalf of Mr. Palmer, noting that Mr. Stutsman had not previously represented Palmer in the February 13, 1978 sentencing proceedings nor in the subsequent appeal thereof, and had not begun any preparation regarding said cause on remand, and

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[3]Judge Bontrager's Memorandum Opinion is in the Appendix, A35-48.

[4]The Court's published opinion is in the Appendix, A28-34.

[5]See Appendix, A17-18, 25.

requested a sixty day continuance of the 1979 sentencing hearing:

> "to allow us time to investigate the case and develop evidence to support our contentions as to why the sentencing should not include an executed sentence in this case."[6]

Over the state's objection, Judge Bontrager granted Palmer a sixty day continuance of the sentencing hearing and held a series of hearings, the purpose of which was apparently to determine whether Palmer should, in fact, be sentenced for the statutory period (A18, 26). The continuance of the sentencing hearing was based upon the then recent March 30, 1979 decision of the United States Court of Appeals for the Fifth Circuit entered in *United States v. Denson*, 588 F.2d 1112 (5th Cir. 1979),[7] and the then recent June 14, 1979 plurality decision of the Supreme Court of California entered in *People v. Tanner*, 24 Cal.3d 514, 156 Cal.Rptr. 450, 596 P.2d 328 (Cal. 1979),[8] which

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[6]Transcript of June 18, 1979 Proceedings appears in the Appendix, A25-27.

[7]In *United States v. Denson*, *supra*, the Fifth Circuit denied a Government petition for a writ of mandamus to correct an illegal, unauthorized lenient sentence which had been imposed by the District Court in violation of 18 U.S.C. §3651 for convictions under 18 U.S.C. §241, because the "granting of the petition will work a *substantial hardship* on the Defendants," 588 F.2d at 1132. The Fifth Circuit considered the records of the defendants, adjustment by the defendants to the punishment assessed, albeit unauthorized, including the securing of employment opportunities, family adjustments, and rehabilitation potential in reaching its decision, factors which had *not* yet been considered in *Palmer* upon sentencing in 1979.

[8]In *People v. Tanner*, *supra*, the Supreme Court of California, while holding that the mandatory language of Penal Code section 1203.06 prohibited the granting of probation to a defendant convicted of robbery, determined that in light of *Denson*, it would be *unjust* to return the defendant to incarceration after compliance with the original, illegal sentence of imprisonment for one year and five years probation, 156 Cal.Rptr. at 453. Justice Tobriner's concurring opinion recognized that "exceptional circumstances—unforeseen by the Legislature—may in rare cases warrant a departure from a generally appropriate sentence." 156 Cal.Rptr. at 455.

established certain new criteria for consideration in determining whether it would be unjust or constitutionally impermissible to resentence a defendant to a prison term *after* the initial sentence had been declared illegal or unauthorized but where the defendant had served the initial prison term, been placed on probation, had rehabilitated himself, adjusted to the sentence imposed, obtained employment and appeared to be an ideal candidate for probation.

On August 1, 1979, Elkhart County Prosecutor Michael A. Cosentino requested that Judge Bontrager recuse himself from further participation in the criminal sentencing proceedings. Judge Bontrager granted the request due to his emotional and personal involvement in the affairs of the defendant and because of his generally known and highly publicized attitudes in the community. On August 8, 1979, Special Judge Sproull was selected and qualified to hear the remainder of the case (A18, 53, 67).

Special Judge Sproull permitted Palmer to offer evidence at an August 24, 1979, presentence hearing for the purpose of determining whether or not Palmer should be made to serve the mandatory nonsuspendable term previously ordered by the Supreme Court of Indiana or be allowed to continue on probation. On September 7, 1979,[9] Special Judge Sproull entered his "Findings of Court and Order of Commitment"[10] finding that the earlier decision of the Supreme Court of Indiana "clearly implies that there can be no granting of probation on the facts and circumstances of this case, and that the original sentence of 10 to 20 years be imposed." However, Special Judge Sproull did make certain findings in light of *People v. Tanner*, 156 Cal.Rptr. 450 (1979), that Palmer had become rehabilitated, had fully complied with the terms of his probation, was

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[9]At this point in time, Palmer had already served one year and had been on probation for one year (September 6, 1978 to September 7, 1979). See Appendix, A18.

[10]Special Judge Sproull's "Findings of Court and Order of Commitment" appears in the Appendix, A21-24.

expecting a new child, and that it would be a hardship upon Palmer to be recommitted to prison for an error committed by the original sentencing judge, thereby permitting Palmer the right and opportunity to raise a *new* constitutional issue as to whether it would constitute cruel and inhuman punishment in violation of state and federal constitutional provisions to recommit Palmer under the facts and circumstances presented.

Noting that the Supreme Court of Indiana had not addressed the constitutional issue presented at the 1979 sentencing hearing, nor did it have before it any evidence concerning Palmer's conduct and record after his initial release, Special Judge Sproull expressed his belief that it was "cruel to return the defendant to prison to serve an additional period of time, as he has served a term fixed by the Court and has fulfilled his original sentence." Complying with the order of the Supreme Court of Indiana, Special Judge Sproull sentenced Palmer to not less than ten nor more than twenty years imprisonment, and ordered that Palmer be given credit for the 365 days he had served. Special Judge Sproull also denied Palmer's request for continued probation, ordering Palmer to report to the Indiana Reception and Diagnostic Center on October 1, 1979 (A23-24).

An appeal bond was fixed upon the deputy prosecutor's agreement, in the sum of Five Thousand Dollars which Palmer satisfied by filing a Five Hundred Dollar cash bond, upon which Palmer was released on September 11, 1979. Palmer then took an appeal to the Supreme Court of Indiana.

Thereafter, on January 30, 1981, in *Palmer v. State*, 415 N.E.2d 707 (1981),[11] the Supreme Court of Indiana dismissed Palmer's appeal, finding it to be a nullity, and ordered the cause remanded to the trial court with orders to immediately commit Palmer to the Department of

[11]The opinion of the Supreme Court of Indiana in *Palmer v. State*, 415 N.E.2d 707 (1981), is in the Appendix, A16-20.

Corrections to serve the sentence imposed on him under the statute. In support of this decision, the unanimous Supreme Court of Indiana explained that:

> "The entry of our judgment, as set out above, completed this cause to a finality, and left no issues to be decided by this Court or the trial court. The trial judge's only remaining duty on remand was to follow the instructions of this Court by striking the portion of his sentencing order which placed Palmer on probation, and by committing him to the Department of Corrections for a period of not less than ten nor more than twenty years, pursuant to the clear and mandatory language of §§35-13-4-4 and 35-7-1-1.
>
> The mandate of this Court to this date has not been carried out by either Judge William Bontrager or Special Judge Richard Sproull. It is apparent that Judge Bontrager chose not to sentence Palmer as the law and our holding obliged him to do."
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> • • •
>
> "Over the objections of the State, Judge Bontrager thereafter held a series of hearings, the purpose of which was apparently to determine whether Palmer should, in fact, be sentenced for the statutory period. Palmer was permitted to call witnesses to attempt to prove that he had been rehabilitated since the time of his original sentencing, and that to force him now to serve his time would be nothing more than vindictive justice."
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> 415 N.E.2d at 708.

Concluding its opinion while commencing the contempt proceedings, the Court stated:

> "We further find that Judge William Bontrager and Special Judge Richard Sproull have directly violated a clear mandate of this Court in a manner that appears to be contemptible of this Court. Accordingly, an order shall issue forthwith directing both judges to personally appear before this Court and show cause

why they should not be held in indirect criminal contempt of this Court. Judgment accordingly.

415 N.E.2d at 709.

Concurrent with its opinion, the Supreme Court of Indiana issued a separate order directing Judge Bontrager and Special Judge Sproull to show cause why they should not be held in indirect criminal contempt of said Court.[12]

On January 31, 1981, pursuant to bench warrants issued by Judge Bontrager and Special Judge Sproull, Palmer surrendered himself to the Sheriff of Elkhart County.

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[12]A copy of the Order appears in the Appendix, A15. However, the caption of the contempt show cause order, *"Harry Fred Palmer, III, Appellant v. State of Indiana, Appellee"* fails to comport with due process requirements. As explained in *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 445-446:

> "In the first place the petition was not entitled "United States v. Samuel Gompers et al.," as would have been proper, and according to some decisions, necessary, if the proceedings had been at law for criminal contempt. This is not a mere matter of form, for manifestly every citizen, however unlearned in the law, by mere inspection of the papers in contempt proceedings ought to be able to see whether it was instituted for private litigation or for public prosecution, whether it sought to benefit the complainant or vindicate the court's authority. He should not be left in doubt as to whether relief or punishment was the object in view. He is not only entitled to be informed of the nature of the charge against him, but to know that it is a charge, and not a suit. United States v. Cruikshank, 92 U.S. 542, 559, 23 L.Ed. 588, 593." 221 U.S. at 445-446.

Similarly, in *Denny v. State*, 203 Ind. 682, 695-696, 182 N.E. 313 (Ind. 1932), the Supreme Court of Indiana adopted the *Gompers* rationale, noting several factors to be considered in determining whether the proceeding for criminal contempt was properly brought. First, "It is necessary to examine the information." Second, the nature and style of the proceedings, analyzing the number and title of the cause, must be considered; and third, the allegations must contain and charge "wilfullness." In *State ex. rel. Indianapolis Bar Ass'n v. Fletcher Trust Co.*, 211 Ind. 27, 40 (1936), the Supreme Court of Indiana reiterated its requirements that:

> "(1) The facts in an information charging a criminal contempt of court must be verified by the oath of the informant upon his personal responsibility, and
>
> (2) That the information for a criminal contempt should be

continued

On February 6, 1981, Judge Bontrager filed a verified response[13] to the Indiana Supreme Court's order to show cause, asserting therein the propriety and constitutionality of his actions in granting Palmer a sixty day continuance of the sentencing hearing and in recusing himself, thereby initially raising the federal questions sought to be reviewed. Thereafter, on February 17, 1981, Judge Bontrager ordered Palmer committed to the custody of the Department of Corrections of the State of Indiana for a period of not less than ten nor more than twenty years, ordered Palmer disfranchised and rendered incapable of holding any office of trust or profit during the term of imprisonment, granted Palmer credit for 365 days served at the maximum good time earning rate, ordered the appeal cash bond returned, and remanded Palmer to the custody of the Sheriff of Elkhart County.[14]

On February 25, 1981, a hearing was held in and before the Supreme Court of Indiana at which Judge Bontrager and Special Judge Sproull appeared in person and by counsel. During the hearing, Judge Bontrager explained

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entitled: State of Indiana vs. the defendant, and filed as an independent action and prosecuted by the State."

Allison v. State ex rel. Allison, 187 N.E.2d 565, 568 (1963).

The contempt to show cause order, A15, and the opinion which accompanied it, A16-20, fail to have the proper caption. Additionally, the contempt proceedings against Judge Bontrager were not filed as an independent action nor were they prosecuted by the state, nor did they charge "wilfullness."

cf. Levick v. Hughlett; Levick v. State of Indiana, 224 Ind. 561, 69 N.E.2d 17 (1946) (unilateral correction of the caption on appeal in an indirect criminal contempt by Supreme Court of Indiana); *Garlin v. State*, 325 N.E.2d 515 (Ind. App. 1975) (unilateral correction of the caption on appeal by the Court of Appeals of Indiana). *See also Ex Parte Fennig*, 216 Ind. 298, 303 (1939); *State ex rel. McMinn v. Gentry*, 229 Ind. 615, 619, 100 N.E.2d 676 (1951).

[13]The "Verified Response To Contempt Citation By Respondent William D. Bontrager, Judge, Elkhart Superior Court No. 2" is in the Appendix, A59-65.

[14]The "Order of Commitment" is in the Appendix, A13-14.

the propriety and constitutionality of his actions in granting Palmer the sixty day continuance of the 1979 sentencing hearing and in recusing himself, thereby reasserting the federal questions sought to be reviewed. Following testimony and a very brief recess, Chief Justice Richard M. Givan announced the Court's decision that Special Judge Sproull was not guilty of contempt, while finding Judge Bontrager guilty of contempt by a split decision, Justices DeBruler and Pivarnik concurring. Judge Bontrager was sentenced to thirty days at the State Farm, to be suspended, and fined Five Hundred Dollars to be paid within one week. Justice Prentice dissented since he had a reasonable doubt as to Judge Bontrager's contempt. Justice Hunter explained his dissent, stating:

> "I cannot bring myself to find that you had a contemptuous attitude toward this court and that is the reason."[15]

On March 6, 1981, the Supreme Court of Indiana issued an "ORDER" which, in relevant part provided that:

> "1. Special Judge, Richard H. Sproull is not guilty of indirect criminal contempt.
>
> 2. Judge William D. Bontrager is guilty of indirect criminal contempt for failing to carry out the mandate of this Court in a previous appeal found in the opinion under Cause No. 778 S 140.
>
> See *State v. Palmer* (1979), Ind. 386 N.E.2d 946. Judge Bontrager is hereby sentenced to 30 days in the State Farm and is fined the sum of $500.00. The fine shall be paid on or before the 5th day of March, 1981.
>
> In addition, due to the gravity of this case, the matter will be referred to the Indiana Judicial Qualifications Commission for investigation. A formal opinion will follow at a later date."[16]

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[15]A Partial Excerpt of Transcript of Proceedings Had in the Supreme Court of Indiana on February 25, 1981, is in the Appendix, A11-12.

[16]The ORDER is in the Appendix, A9-10. See footnote 12, *supra*.

Subsequently, a formal, reported opinion was issued by the Supreme Court of Indiana on March 31, 1981, *Palmer v. State*, Ind., 418 N.E.2d 530 (1981).[17] In support of its finding that Judge Bontrager was guilty of indirect criminal contempt, the Supreme Court of Indiana held the sixty day continuance of the 1979 sentencing hearing to be an "unseemly delay" while condemning Judge Bontrager's recusal. The relevant portion of the opinion explains:

> "Nearly two months after this Court's first opinion was certified to Judge Bontrager's court, the prosecuting attorney, Michael Cosentino, called on Judge Bontrager in his chambers and suggested that he recuse himself from the case, due to his emotional and personal involvement in the affairs of this defendant. Judge Bontrager recognized the validity of Cosentino's assertions; he also recognized that his attitudes were generally known and highly publicized in the community. For those reasons, he recused himself and provided for the selection of a special judge to continue the cause. Thus, Judge Bontrager had the orders of this Court before him for a period of almost two months, orders which he fully understood and yet totally failed to execute."
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> • • •
>
> "After Judge Bontrager's unseemly delay of almost two months, he placed himself in a position where he could not execute our order, and recused himself from the case without ever having done so."
>
> 418 N.E.2d at 532 (A5-6).

Of particular note, if not completely inconsistent with its finding that Judge Bontrager was in indirect criminal contempt of court for his granting Palmer a sixty day continuance of the 1979 sentencing hearing so that Palmer could make a record and raise constitutional issues he felt were available to him in light of *Denson* and *Tanner*, the

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[17]The opinion in *Palmer v. State*, Ind., 418 N.E.2d 530 (1981), appears in the Appendix, A2-8.

Supreme Court of Indiana explained why Special Judge Sproull was *not* guilty of indirect criminal contempt:

> "The evidence at the February 25 hearing showed that Special Judge Sproull indicated to the parties from the beginning of his involvement in the case that, in his opinion, the only option he had was to follow the mandate of this Court, which would require him to sentence Palmer to a ten-to-twenty-year term and commit him to the Department of Corrections. Special Judge Sproull felt, however, that Palmer did have a right to make a record and raise the due process issues he felt were available to him; Sproull then permitted him to do so, to facilitate presentation of those issues to this Court for review. Special Judge Sproull stated that he did feel that Palmer had a right to raise these issues on an appeal to this Court. It was apparent that the deputy prosecutor handling the case agreed that Palmer did have appealable issues to present. Thus, all concerned agreed that Palmer should be permitted to make a record of those issues and thereafter should be permitted to perfect an appeal to this Court. The deputy prosecutor also agreed to the fixing of an appeal bond pending the purported appeal. As noted earlier, we subsequently dismissed that appeal.
>
> Even though we feel Special Judge Sproull was incorrect in his analysis of the questions in this case and improperly allowed Palmer to be free on bond after his commitment, we have a reasonable doubt whether his actions and intentions amounted to indirect criminal contempt of this Court. Special Judge Sproull came into this case at a very late date, and was faced with a situation which any special judge would find difficult. He followed a course of action which he sincerely believed was in compliance with this Court's order. His actions in permitting Palmer to make a record and post an appeal bond were encouraged by all of the parties, or at least were not objected to. We therefore found that Special Judge Sproull was not guilty of indirect criminal contempt of this Court.
>
> 418 N.E.2d at 532-533 (A7-8).

On April 3, 1981, Judge Bontrager received a copy of the Supreme Court's formal opinion and on April 23, 1981, filed an application for rehearing and reconsideration[18] before the Supreme Court of Indiana, asserting that (a) he acted reasonably in granting Palmer a sixty day continuance of the 1979 sentencing hearing so that Palmer and his new public defender could have an opportunity to present evidence regarding the issue addressed in *Tanner* and *Denson* as to whether it would be unjust, or work a substantial hardship or otherwise constitute cruel and unusual punishment to sentence Palmer under the facts of the case, and (b) that his recusal was appropriate in light of the County Prosecutor's request and Canon 3(C)(1)(a) of the Indiana Code of Judicial Conduct, and (c) that there was no evidence that Judge Bontrager intended to avoid compliance with the Supreme Court's mandate, thereby preserving his federal questions as to the validity and constitutionality of his actions.

On June 17, 1981, Judge Bontrager's application for rehearing and reconsideration was denied by the Supreme Court of Indiana,[19] terminating the litigation between the parties in the Indiana courts.

REASONS FOR GRANTING THE WRIT

1. THE DECISION OF THE SUPREME COURT OF INDIANA UNCONSTITUTIONALLY PENALIZES A TRIAL JUDGE FOR ACCORDING A CRIMINAL DEFENDANT DUE PROCESS AT THE SENTENCING STAGE OF REMANDED CRIMINAL PROCEEDINGS.

The sentencing portion of a criminal case constitutes a critical stage of the proceedings at which a defendant is

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[18]The Application Of William D. Bontrager For Rehearing and Reconsideration To Be Submitted On Written Pleadings appears in the Appendix, A51-58.

[19]The notice and order denying rehearing and reconsideration appears in the Appendix, A1.

entitled to the effective assistance of counsel. *Gardner v. Florida*, 430 U.S. 349, 358 (1977); *Mempa v. Rhay*, 389 U.S. 128, 134 (1967); *Townsend v. Burke*, 334 U.S. 736, 741 (1948). This fundamental right to the effective assistance of counsel includes not only the right to representation by counsel during a sentencing, but also prior thereto in order that such counsel may investigate the facts, interview witnesses, consult with the defendant, and prepare his case. *Powell v. Alabama*, 287 U.S. 45, 57-58 (1932); *accord, Hoy v. State*, 225 Ind. 428, 436-438, 75 N.E.2d 915 (1947); *Lloyd v. State*, 241 Ind. 192, 196-199, 170 N.E.2d 904 (1960).

In holding Judge Bontrager in indirect criminal contempt, the Supreme Court of Indiana explained that:

> "Nearly two months after this Court's first opinion was certified to Judge Bontrager's court, the prosecuting attorney, Michael Cosentino, called on Judge Bontrager in his chambers and suggested that he recuse himself from the case, due to his emotional and personal involvement in the affairs of this defendant. Judge Bontrager recognized the validity of Consentino's assertions; he also recognized that his attitudes were generally known and highly publicized in the community. For those reasons, he recused himself and provided for the selection of a special judge to continue the cause. Thus, Judge Bontrager had the orders of this Court before him for a period of almost two months, orders which he fully understood and yet totally failed to execute."
>
> • • •
>
> "After Judge Bontrager's unseemly delay of almost two months, he placed himself in a position where he could not execute our order, and recused himself from the case without having done so."
>
> *Palmer v. State*, 418 N.E.2d at 532.

However, the Indiana Supreme Court evidently failed to consider the reasons for the sixty day continuance of the sentencing hearing after a remand from an initial

unauthorized, void sentence. The chronology of the events after remand is crucial.

On March 23, 1979, Judge Bontrager received an unofficial opinion of the Indiana Supreme Court reversing the initial sentence which had been imposed on February 13, 1978. Thereafter, on April 23, 1979, Judge Bontrager appointed David Stutsman, a member of the Elkhart Superior Court's Public Defender staff to represent Palmer. Yet, it was not until June 8, 1979, that Judge Bontrager and the public defender received the certified opinion of the Indiana Supreme Court in *State v. Palmer*, 386 N.E.2d 946 (1979), at which time a sentencing hearing was promptly scheduled for June 18, 1979 (A52).

On June 18, 1979, Palmer and his public defender, Mr. Stutsman, appeared before Judge Bontrager and requested a sixty day continuance of the sentencing hearing to allow the public defender a reasonable opportunity to investigate the case and develop evidence to support a new issue, not previously addressed by the Indiana Supreme Court, namely:

> Whether it would be unjust or constitute cruel and unusual punishment to resentence a defendant to a prison term *after* the initial sentence had been declared illegal or unauthorized but where the defendant had served the initial prison term, been placed on probation, had rehabilitated himself, adjusted to the sentence imposed, obtained employment and appeared to be an ideal candidate for probation.

Factors supporting the granting of the requested sixty day continuance of the sentencing hearing included:

1. Mr. Stutsman's lack of knowledge of the case, since he had not represented Palmer in the original 1978 proceedings nor in the appeal therefrom (A52);

2. Mr. Stutsman's intent to leave the Elkhart Superior Court's Public Defender staff effective July 1, 1979 (A53);

3. The necessity of having a new public defender staff member appointed to represent Palmer at the sentencing hearing; and

4. The then recent decisions in *Denson* and *Tanner* which had issued on March 30, 1979, and June 14, 1979, respectively.

Indeed, on July 1, 1979, Mr. Stutsman left the Public Defender staff and, on July 6, 1979, was granted leave to withdraw his appearance whereupon a new member of the Public Defender staff, James Stevens, was appointed by Judge Bontrager to represent Palmer (A53). Since Judge Bontrager could allow a reasonable time for adjournment of the sentencing hearing for good cause shown, as a discretionary judicial matter, IC 35-8-1A-2, and considering that before sentencing a person for a felony the trial court must conduct a hearing to consider the facts and circumstances relevant to sentencing at which time the defendant is entitled to subpoena and call witnesses and present evidence on his behalf, IC 35-8-1A-3 (formerly IC 35-4.1-4-3), and in light of the foregoing factual matters, Judge Bontrager properly granted Palmer a sixty day continuance (from June 18, 1979 to August 20, 1979) of the sentencing hearing.

As the Indiana Supreme Court has readily observed:

> "The fundamental right of a defendant in a criminal case to have competent counsel assist him in his defense carriers with it as a necessary corollary the right that such counsel shall have adequate time in which to prepare the defense."

Sweet v. State, 117 N.E.2d 745, 746 (1954); *Powell v. Alabama*, *supra*.

Thus, not only does a defendant have a right to be represented by counsel at a resentencing hearing, he has a right to be represented by counsel who has had a reasonable opportunity to prepare for the resentencing hearing. *Stevenson v. State*, 327 N.E.2d 621, 624 (Ind.App. 1975); *Mempa v. Rhay*, *supra*; *Bradley v. State*, 227 Ind. 131, 136-

137, 84 N.E.2d 580 (1949). *See generally, Specht v. Patterson*, 386 U.S. 605 (1967).[20] Decidedly, "the sentencing process...must satisfy the requirements of the Due Process Clause." *Gardner v. Florida, supra*, 430 U.S. at 358. To have rushed Palmer through a sentencing hearing, as an expedient to satisfy the Indiana Supreme Court's overt desire to achieve automatic compliance with its orders, would have been to deny Palmer his fundamental right to due process as secured to him by Section 1 of the Fourteenth Amendment to the Constitution of the United States and by Article 1, §12 of the Constitution of Indiana.

The ramifications of permitting the Indiana Supreme Court's indirect criminal contempt opinion to stand are incredible, warranting the granting of a writ of certiorari as prayed. For example, if the opinion in *Palmer v. State, supra*, 418 N.E.2d 530, is allowed to stand, trial courts will be compelled to effect immediate compliance with appellate court orders, even where intervening events or decisions of other appellate jurisdictions, state and federal, dictate a result contrary to the Indiana Supreme Court's order.[21]

As the Indiana Supreme Court observed in its indirect criminal contempt opinion, Special Judge Sproull, Palmer's counsel *and* the prosecutor all agreed that Palmer

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[20]Petitioner does not presume to fix any minimum or maximum periods of time which must be allowed by a trial court in every case between the time of the appointment of counsel and the commencement of a sentencing hearing. However, under the particular facts and circumstances of the *Palmer* resentencing, the petitioner respectfully submits that the sixty day continuance was reasonable, if not constitutionally warranted.

[21]Petitioner does not argue that orders and judgments of appellate courts need not be complied with promptly and completely by trial courts, *Maness v. Meyers*, 419 U.S. 449, 458-459 (1975). Though, where a trial court, in good faith and without intent to evade compliance with an appellate court order, reasonably believes that a continuance of a hearing is appropriate, good cause having been shown therefor, a finding of indirect criminal contempt of the trial court by the appellate court for failure to immediately comply with its order is unwarranted.

did, in fact, have appealable issues to present, that Palmer should be permitted the right to make a record of those issues, and that thereafter Palmer should be permitted to perfect an appeal to the Indiana Supreme Court. Indeed, agreement was even reached to the fixing of an appeal bond pending appeal of the mandatory sentence which had to be imposed in compliance with the Indiana Supreme Court's initial reported decision. Yet, in finding Special Judge Sproull not guilty of indirect criminal contempt, the Indiana Supreme Court observed that (a) Special Judge Sproull followed a course of action he sincerely believed was in compliance with the earlier remand order, (b) his actions were encouraged by all of the parties, *or at least were not objected to*, and (c) he felt that Palmer did have a right to make a record and raise the due process issues he felt were available to him. *Palmer v. State, supra*, 418 N.E.2d at 532-533.

The only difference, substantive or otherwise, between Judge Bontrager and Special Judge Sproull was the obvious "unseemly" fact that *over the prosecutor's objection*, Judge Bontrager granted Palmer a sixty day continuance to prepare for the sentencing hearing. Otherwise, agreement was unanimous that Palmer did have appealable issues to present, should be permitted the right to make a record of those issues, and thereafter should be permitted to perfect an appeal to the Indiana Supreme Court. The inconsistency is glaring, if not constitutionally abhorrent.

2. A TRIAL JUDGE'S RECUSAL FROM FURTHER PARTICIPATION IN A REMANDED CRIMINAL SENTENCING PROCEEDING WHERE HIS IMPARTIALITY MIGHT REASONABLY BE QUESTIONED CANNOT CONSTITUTE A BASIS FOR CONTEMPT.

"A fair trial in a fair tribunal is a basic requirement of due process....But our system of law has always

endeavored to prevent even the probability of unfairness." *In re Murchison*, 349 U.S. 133, 136 (1955). Otherwise stated, "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954).

In the case at bar, Judge Bontrager, on August 6, 1979, recused himself from the resentencing proceedings at the specific request of the Elkhart County Prosecutor who, on August 1, 1979 (A53, 61, 67), personally made such request due to Judge Bontrager's generally known and highly publicized attitudes and because of Judge Bontrager's emotional and personal involvement in the affairs of the defendant, Harry Fred Palmer, III. Obviously, Judge Bontrager's recusal precluded him from carrying out the order of the Indiana Supreme Court to correct Palmer's sentence which invoked the wrath of that tribunal. The Court's language infers, albeit unmeritoriously, that Judge Bontrager was attempting to "trifle" with that Court and "circumvent a compliance" with its order to impose the statutorily required, nonsuspendable sentence of not less than ten nor more than twenty years imprisonment for Palmer's crime of first degree burglary. IC 35-13-4-4(a) and IC 35-7-1-1 (Burns 1975).

Believing that his impartiality might reasonably be questioned, and congnizant of the provisions of Canon 3(C)(1)(a) of the Indiana Code of Judicial Conduct, Judge Bontrager properly and constitutionally recused himself from further participation in the *Palmer* case. *See* 1 ABA Standards For Criminal Justice, Standard 6-1.7 (2d ed. 1980). Clearly, in order to protect the constitutional right of the accused and of the public to an impartial hearing, Judge Bontrager had no alternative but to recuse himself, since Palmer's right to a hearing before an impartial judge is an unquestioned part of our concept of due process of law. *See Holt v. Virginia*, 381 U.S. 131 (1965).

To permit the Indiana Supreme Court's indirect criminal contempt opinion to stand is to condone an appearance of unfairness in criminal matters, sanction an

abrogation of fundamental due process, while approving conduct unbecoming the judiciary. Conclusively, this Court must reaffirm its prior decisions which cry out for a continuation of fundamental, constitutional fairness.

3. THE DECISION OF THE SUPREME COURT OF INDIANA HOLDING A TRIAL JUDGE IN CONTEMPT OF THAT COURT WITHOUT FINDING ANY INTENT TO BE CONTEMPTUOUS IS ERRONEOUS.

A prerequisite to a finding of indirect criminal contempt is the presence of an intent to disobey, *Cooke v. United States*, 267 U.S. 517, 538 (1925); *In re Watts*, *supra*, 190 U.S. at 34-35; *Wilson v. State of North Carolina*, 169 U.S. 586, 600 (1898), or to defy the authority of a court. *Denny v. State*, 203 Ind. 682, 707, 82 N.E. 313, 321 (1932); *Allison v. State ex rel. Allison*, *supra*, 187 N.E.2d at 568. As explained in *In re Perrello*, 291 N.E.2d 698, 700 (1973):

> "A criminal contempt can be any act which manifests a disrespect for and defiance of a court. The *willful* disobedience of a court order can constitute indirect criminal contempt. [citation omitted] However, the act must be done willfully and with intent to show disrespect or defiance."

IC 33-2-1-4 gives the Supreme Court of Indiana "full power... to punish by fine and imprisonment for contempt of its authority and process...." *Allison*, *supra*.

In adjudicating Judge Bontrager guilty of an indirect criminal contempt, the Indiana Supreme Court observed that Judge Bontrager "did not deny any of the facts disclosed in the record, but spoke only in mitigation, concerning his claimed lack of intent to be contemptuous of this Court." *Palmer v. State*, *supra*, 418 N.E.2d at 532. Yet, the state tribunal also recognized that Judge Bontrager "had examined opinions from other jurisdictions that had spoken on this general subject" regarding recommitment of a criminal defendant after being placed on probation.

People v. Tanner, supra; United States v. Denson, supra. Of course, the timing sequence regarding these intervening decisions and the circumstances for granting a continuance of the sentencing hearing as well as the constitutional necessity of a recusal were not addressed by the Indiana Supreme Court, albeit inadvertently.

Petitioner respectfully contends that there was, at least, a reasonable doubt as to Judge Bontrager's intent to defy the resentencing order of the Indiana Supreme Court. At best, though, the record discloses an absence of any intent to disobey or defy the original state supreme court order. Certainly, considering the reasons for granting the continuance of the sentencing hearing, and the fundamental due process implications surrounding the recusal, Judge Bontrager acted in a manner respectful of *both* the defendant's rights and the Indiana Supreme Court's order. Nothing more could be demanded; nothing less could suffice.

CONCLUSION

Petitioner respectfully prays that a Writ of Certiorari to the Supreme Court of Indiana be granted.

Respectfully submitted,

Ronald E. Elberger
BOSE MCKINNEY & EVANS
1100 First Federal Building
Indianapolis, Indiana 46204
(317) 637-5353
Attorney for Petitioner

APPENDIX

OPINIONS BELOW

IN THE SUPREME COURT OF INDIANA
Cause No. 880S353

HARRY FRED PALMER, III v. STATE OF INDIANA

You are hereby notified that the Supreme Court has on this day: Application of William D. Bontrager for Rehearing and Reconsideration to be Submitted on Written Pleadings is hereby Denied. Givan, C.J. All Justices Concur.

(Seal)

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 17th day of June, 1981.

/s/ Marjorie H. O'Laughlin
Clerk Supreme Court and
Court of Appeals

IN THE SUPREME COURT OF INDIANA
Cause No. 880 S 353
March 31, 1981

HARRY FRED PALMER, III,

Appellant,

v.

STATE OF INDIANA,

Appellee.

CONTEMPT PROCEEDING

PIVARNIK, Justice.

This proceeding arises out of an order issued by this Court on January 30, 1981, to the Honorable William D. Bontrager, Judge of the Elkhart Superior Court Number Two, and the Honorable Richard H. Sproull, Special Judge of that court, directing them to appear before this Court and show cause why they should not be held in indirect criminal contempt for failure to carry out an order of this Court. The order in question directed the trial court to sentence Harry Fred Palmer III as required by statute. We issued the show cause order concurrent with findings which were published in an opinion handed down January 30, 1981. *Palmer v. State*, (1981) Ind., 415 N.E.2d 707. This opinion is issued pursuant to our written order of March 6, 1981, finding Judge Bontrager guilty and Special Judge Sproull not guilty of indirect criminal contempt.

All of the facts on which we based our appraisal of apparent contempt were contained within the records filed with this Court. Defendant Palmer entered a plea of guilty to a charge of first degree burglary, under Ind. Code §35-13-4-4 (Burns 1975), in Judge Bontrager's court. Under Ind. Code §35-7-1-1 (Burns 1975), first degree burglary was

one of several enumerated crimes for which the sentencing court was prohibited from suspending the sentence and placing the defendant on probation. On February 13, 1978, Judge Bontrager sentenced Palmer to not less than ten nor more than twenty years on his plea of guilty, as the burglary statute provided. Judge Bontrager then found §35-7-1-1 to be unconstitutional, and thereafter ordered Palmer to serve a sentence of one year, the balance of the sentence to be suspended and Palmer to be placed on probation for a period of five years. The State then prosecuted an appeal.

We decided the original appeal in this case on March 22, 1979. *State v. Palmer*, (1979) Ind., 386 N.E.2d 946. We held that the applicable statutes were constitutional, and that the trial court was therefore limited to sentencing Palmer—by virtue of his guilty plea—to not less than ten nor more than twenty years; we further held that Judge Bontrager had no authority to suspend Palmer's sentence in any fashion. We then remanded the cause to the trial court with directions to modify its judgment accordingly.

This case then came back to us a second time, on Palmer's attempt to present alleged additional issues. We disposed of that appeal by dismissal in our January 30, 1981, opinion. The record showed that, after Palmer's petition for rehearing was denied by this Court following our *first* opinion, a copy of that opinion was certified to Judge Bontrager's court on June 8, 1979. At this point, Judge Bontrager set the matter for "further proceedings." On June 18, 1979, over the State's objection, Judge Bontrager continued sentencing to August 20, and further directed the parties to make omnibus-type disclosure by August 6 of all witnesses and evidence to be introduced at the "further proceedings." Several motions were filed, relating to the scope of discovery, a change in defendant's counsel, and a request for a delay in sentencing pending an appeal to the United States Supreme Court. Palmer also requested a delay in sentencing pending resolution of a case then under

consideration by the Supreme Court. Judge Bontrager deferred all rulings. Finally, on August 6, 1979, Judge Bontrager recused himself from the cause without ever having sentenced Palmer pursuant to the statutes and the order of this Court.

On August 8, 1979, Richard H. Sproull appeared and qualified as Special Judge. He conducted a hearing on August 24, 1979, concerning all pending matters. Special Judge Sproull granted the State's motion for a protective order, denied Palmer's motion to delay sentencing, and set the matter for sentencing on September 5, 1979. On September 7, Special Judge Sproull entered written findings. He found the defendant to be rehabilitated and suggested that it would be cruel to return him to prison at that time. In spite of these findings, he acknowledged this Court's order and sentenced Palmer to the Department of Corrections for a term of ten to twenty years, with credit for time already served. Palmer was ordered to report to the diagnostic center on October 1, 1979. Special Judge Sproull then fixed an appeal bond in the amount of five thousand dollars ($5,000.00). Palmer filed a five hundred dollar ($500.00) cash bond, and was released on September 11, 1979.

We held in our *second* opinion that all issues in the cause had already been decided in our original opinion and, therefore, that no appealable issues remained for our consideration. We noted that, after the March 22, 1979 opinion was certified to the trial court, the only thing left for the trial court to do was to follow the directives in that opinion by striking its order suspending Palmer's sentence and placing him on probation, and thereafter order him committed as the statutes provided. The trial judge had no discretion to act in any other way. There was, therefore, no appeal available to Palmer, and no reason for him to be released on an appeal bond. If the defendant felt at that time that he had remedies to pursue relative to the situation in which he then found himself, he could have raised—and

still could raise—those issues in any subsequent actions he thought appropriate. However, there was nothing further to be raised or decided on that attempted second direct appeal. *Palmer v. State*, (1981) Ind., 415 N.E.2d 707, 708-09.

Pursuant to our show cause order, Judges Bontrager and Sproull appeared with counsel before us on February 25, 1981. The evidence adduced at that hearing showed that the facts already in the record were accurately presented in the two appeals we have considered involving this defendant. The facts further showed that both judges understood the orders of this Court and knew that, under those orders, it was mandatory that Palmer be sentenced to a ten-to-twenty-year term and committed to the Department of Corrections.

Judge Bontrager did not deny any of the facts disclosed in the record, but spoke only in mitigation, concerning his claimed lack of intent to be contemptuous of this Court. He testified of his concern for Palmer's position of being sentenced to a full term after having complied, to that point, with the terms of Judge Bontrager's original sentence, even though this first sentence was found to be illegal. He said he had examined opinions from other jurisdictions that had spoken on this general subject, and was aware that the United States Supreme Court was considering a case in which this general type of due process question was at issue. Further, Judge Bontrager had made public statements concerning Palmer's case and the first opinion handed down by this Court, which were much discussed in the Elkhart County media and among the citizens of the community.

[1] Nearly two months after this Court's first opinion was certified to Judge Bontrager's court, the prosecuting attorney, Michael Cosentino, called on Judge Bontrager in his chambers and suggested that he recuse himself from the case, due to his emotional and personal involvement in the affairs of this defendant. Judge Bontrager recognized

the validity of Cosentino's assertions; he also recognized that his attitudes were generally known and highly publicized in the community. For those reasons, he recused himself and provided for the selection of a special judge to continue the cause. Thus, Judge Bontrager had the orders of this Court before him for a period of almost two months, orders which he fully understood and yet totally failed to execute.

In a similar contempt proceeding, we had occasion to speak on the conduct of a trial judge who unduly delayed responding to the orders of this Court, where that delay was obviously caused by the trial judge's reluctance to follow those orders. In *State ex rel. Sedam v. Ripley Circuit Court*, (1973) 262 Ind. 25, 27, 302 N.E.2d 761, 762, we stated:

> "It appears to this Court that this unseemly delay in executing the orders of this Court was an intentional attempt to thwart the effectiveness of the order which resulted in stirring up additional litigation in Respondent's court as well as in this Court. All of this matter could have been disposed of on August 31, 1973, when Respondent partially executed the orders of this Court. We have concluded from the evidence before us that there has been an attempt to trifle with the Court and to circumvent a compliance with the orders of this Court, thus unnecessarily requiring our time and attention and that of other public officials."

After Judge Bontrager's unseemly delay of almost two months, he placed himself in a position where he could not execute our order, and recused himself from the case without ever having done so.

At the February 25 hearing, we found Judge Bontrager guilty of indirect criminal contempt for failing to carry out the mandate of this Court. We sentenced him to thirty days imprisonment at the State Farm and fined him in the sum of five hundred dollars ($500.00). The prison term was suspended, and the fine was ordered paid on or before March 5, 1981. We further ordered that the matter of Judge

Bontrager's conduct would be referred to the Judicial Qualifications Commission for investigation.

[2] The evidence at the February 25 hearing showed that Special Judge Sproull indicated to the parties from the beginning of his involvement in the case that, in his opinion, the only option he had was to follow the mandate of this Court, which would require him to sentence Palmer to a ten-to-twenty-year term and commit him to the Department of Corrections. Special Judge Sproull felt, however, that Palmer did have a right to make a record and raise the due process issues he felt were available to him; Sproull then permitted him to do so, to facilitate presentation of those issues to this Court for review. Special Judge Sproull stated that he did feel that Palmer had a right to raise these issues on an appeal to this Court. It was apparent that the deputy prosecutor handling the case agreed that Palmer did have appealable issues to present. Thus, all concerned agreed that Palmer should be permitted to make a record of those issues and thereafter should be permitted to perfect an appeal to this Court. The deputy prosecutor also agreed to the fixing of an appeal bond pending the purported appeal. As noted earlier, we subsequently dismissed that appeal.

Even though we feel Special Judge Sproull was incorrect in his analysis of the questions in this case and improperly allowed Palmer to be free on bond after his commitment, we have a reasonable doubt whether his actions and intentions amounted to indirect criminal contempt of this Court. Special Judge Sproull came into this cause at a very late date, and was faced with a situation which any special judge would find difficult. He followed a course of action which he sincerely believed was in compliance with this Court's order. His actions in permitting Palmer to make a record and post an appeal bond were encouraged by all of the parties, or at least were not objected to. We therefore

found that Special Judge Sproull was not guilty of indirect criminal contempt of this Court.

GIVAN, C. J., and DeBRULER, J., concur.

HUNTER, J., dissents in part and concurs in part in separate opinion in which PRENTICE, J., concurs.

HUNTER, Justice, dissenting in part, concurring in part.

I dissent from the majority's opinion finding that Judge Bontrager is guilty of indirect criminal contempt, but I concur in the necessity of the referral of this matter of Judge Bontrager's conduct to the Judicial Qualifications Commission by reason of his reluctance to follow the law and this Court's order. He subscribed to the same oath which each member of the judiciary subscribes to when he takes office—that is, to uphold the Constitution of the United States of America and the Constitution and laws of the State of Indiana to the best of his skill and ability. I believe there is a grave question concerning Judge Bontrager's judicial demeanor.

I also concur in the finding that Special Judge Sproull was not guilty of indirect criminal contempt of this Court.

PRENTICE, J., concurs

IN THE SUPREME COURT OF INDIANA
Cause No. 880 S 353

HARRY FRED PALMER, III,

Appellant,

vs.

STATE OF INDIANA,

Appellee.

ORDER

On January 30, 1981, the Supreme Court of Indiana issued an order to the Honorable William D. Bontrager, Judge Elkhart Superior Court No. 2 and to the Honorable Richard H. Sproull, Special Judge of the Elkhart Superior Court No. 2, wherein both Judge Bontrager and Special Judge Sproull were ordered to appear before this Court on February 25, 1981, and show cause why they should not each be held in indirect criminal contempt in the above-captioned cause.

At the hearing both Judge Bontrager and Special Judge Sproull presented evidence regarding their actions in the above-captioned case. After deliberation, this Court finds as follows:

1. Special Judge, Richard H. Sproull is not guilty of indirect criminal contempt;
2. Judge William D. Bontrager is guilty of indirect criminal contempt for failing to carry out the mandate of this Court in a previous appeal found in the opinion under Cause No. 778 S 140.

See *State v. Palmer* (1979), Ind. 386 N.E.2d 946. Judge Bontrager is hereby sentenced to 30 days in the State Farm and is fined in the sum of $500.00. The 30 days

imprisonment is ordered suspended. The fine shall be paid on or before the 5 day of March, 1981.

In addition, due to the gravity of this case, the matter will be referred to the Indiana Judicial Qualifications Commission for investigation. A formal opinion will follow at a later date.

Copies of this order shall be sent to Richard E. Steinbronn, 6th Floor, 1st Bank Building, South Bend, Indiana; and William J. Nye, 202 Tower Building, Elkhart, Indiana 46514.

DONE AT Indianapolis, Indiana this 6 day of March, 1981.

/s/ RICHARD M. GIVAN
Chief Justice

DeBruler and Pivarnik, J.J., CONCUR
Hunter and Prentice, J.J., DISSENT

IN THE SUPREME COURT OF INDIANA
Cause No. 880 S 353
(Filed Supreme Court of Indiana—March 2, 1981)

HARRY FRED PALMER, III,

Appellant,

v.

STATE OF INDIANA,

Appellee.

PARTIAL EXCERPT OF TRANSCRIPT OF PROCEEDINGS HAD IN THE SUPREME COURT OF INDIANA ON FEBRUARY 25, 1981

CHIEF JUSTICE GIVAN: Ladies and gentlemen, we will handle Judge Sproull's situation first. As far as this court is concerned, by unanimous decision, the court feels that Judge Sproull is not guilty of contempt of the court; that he was in a bad situation. Maybe we wouldn't have done what he did, but we gave him the benefit of the doubt in this thing and find him not guilty.

As far as Judge Bontrager is concerned, we find him guilty of contempt of this court by a split decision. Justice Prentice and Justice Hunter dissent to that and the three remaining Justices find him guilty of contempt of court, fix his penalty at 30 days' sentence at the State Farm, to be suspended, and $500 fine to be executed, to be paid within one week of today.

Further, the matter of Judge Bontrager's conduct on the bench and his conduct in this matter, especially in view of the grave harm it has impinged upon the defendant in the criminal case in misleading him and causing him great anxiety and the confusion it has caused the community, the court is referring the

matter to the Judicial Qualifications Commission for further examination; and, we are instructing them to look into Judge Bontrager's conduct in its entirety on the bench at this time, as to whether or not he should continue as a judge in that court. We will await the findings of the Disciplinary Commission in that regard.

Is there any question by counsel or the parties from either side?

* * *

JUSTICE PRENTICE: Judge Bontrager, I want to explain my vote to you, sir. I think your conduct in this case demonstrated a probable contempt. The evidence, however, left me with a reasonable doubt. So it's my opinion that you did not exonerate yourself but that you were not required to exonerate yourself. You stood before the court cloaked with the presumption of innocence. I had a doubt in my mind, and I gave you the benefit of that doubt.

MR. BONTRAGER: Thank you, sir.

JUSTICE HUNTER: Judge Bontrager, I think I was as incisive as I knew how to be in getting to the bottom line or the core of your attitude in this matter. And while I cannot personally excuse what you did, I cannot bring myself to find that you had a contemptuous attitude toward this court and that is the reason.

But I do want to say again and reiterate that I cannot in my own mind actually excuse you for your actions; but, finding you in contempt of this court is yet another matter. And that's the reason I have dissented.

IN THE ELKHART SUPERIOR COURT NO. 2

Cause No. 1136

(Filed Elkhart Superior Court No. 2—February 17, 1981)

State of Indiana

v.

Harry Fred Palmer, III

ORDER OF COMMITMENT

This cause having come on for sentencing of the defendant, Harry Fred Palmer, III, and the Court having heretofore entered judgment of conviction against the defendant for the crime of First Degree Burglary and having found the defendant's true age to be ____ years, and having conducted sentencing hearing.

The Court now orders the defendant committed to the care, charge, custody and control of the Department of Corrections of the State of Indiana for a period of not less than 10 nor more than 20 years and further orders that the defendant be disfranchised and rendered incapable of holding any office of trust or profit during the term of any such imprisonment;

The Court further orders that the defendant pay and satisfy the costs of this action, and the Court now finds that the defendant being indigent shall not be imprisoned for failing to pay such costs;

The Court further orders that the defendant be granted ____ days credit for time served prior to disposition of these proceedings against the order of commitment imposed and that the defendant shall receive such credit at the maximum good time earning rate.

The Court further orders that the Sheriff of Elkhart County transport the defendant to Reception/Diagnostic

Center for the purpose of carrying out the sentence of this court;

The Court now orders that a transcript of the proceedings on arraignment and sentencing of the defendant be made a part of the proceedings herein;

The Court now orders the 90% cash bond and surety of the defendant returned to the person posting same;

And the Court orders the defendant remanded to the custody of the Sheriff of Elkhart County for carrying out the order of commitment heretofore made.

SO ORDERED this 17 day of February, 1981.

/s/ William D. Bontrager
Judge of Elkhart Superior Court
No. 2

IN THE SUPREME COURT OF INDIANA

Cause No. 880 S 353

January 30, 1981

Harry Fred Palmer, III,

Appellant,

v.

State of Indiana,

Appellee.

ORDER

Pursuant to the written opinion of this Court in this cause issued this date, this Court hereby orders Richard H. Sproull, Special Judge, and The Honorable William D. Bontrager, regular Judge of Elkhart Superior Court No. 2, to personally appear before this Court on the 25th day of February, 1981, at 10:00 a.m., Eastern Standard Time, and show cause why they should not be held in indirect criminal contempt of this Court.

The Sheriff of this Court is directed to cause a copy of this Order and this Court's written opinion in this case to be personally served upon the above-named parties, and due return made.

DONE at Indianapolis, Indiana, this 30 day of January, 1981.

/s/ Richard M. Givan
Chief Justice of Indiana

IN THE SUPREME COURT OF INDIANA

No. 880 S 353

January 30, 1981

Rehearing Denied March 3, 1981

Harry Fred Palmer, III,

Appellant,

v.

State of Indiana,

Appellee.

APPEAL FROM THE ELKHART SUPERIOR COURT NO. 2 THE HONORABLE RICHARD H. SPROULL, SPECIAL JUDGE

PIVARNIK, Justice.

Appellant Harry Fred Palmer attempts to appeal a case which has already been decided by this Court. We decided this cause on March 22, 1979. *State v. Palmer*, (1979) Ind., 386 N.E.2d 946. The trial court received a certified copy of our opinion on June 8, 1979.

For purposes of disposing of this attempted appeal, we again set forth the relevant procedural facts of this case. On September 12, 1977, appellant Palmer was charged with first degree burglary under Ind.Code § 35-13-4-4 (Burns 1975). On January 16, 1978, he withdrew his plea of not guilty and entered a plea of guilty as charged. On February 13, 1978, Palmer was sentenced by regular Judge William Bontrager to serve a sentence of not less than ten nor more than twenty years, as provided by the statute. Our legislature had further provided, in § 35-7-1-1, that first degree burglary was one of several enumerated crimes for which the sentencing court was prohibited from

suspending the sentence and placing the defendant on probation. However, Judge Bontrager found this provision to be unconstitutional, and decreed that Palmer should serve a sentence of one year, the balance of the sentence to be suspended and Palmer to be placed on probation for a period of five years.

The State appealed the trial court's ruling. We held that the trial court had no authority to enter an order suspending Palmer's sentence, since the trial court was limited to sentencing him under the provisions of the applicable statutes. The cause was then remanded to the trial court with the following holding and order:

> "We accordingly hold that the trial court had no authority to enter an order suspending Palmer's sentence and was limited to sentencing the defendant under the provisions of the old code which were applicable at that time. The cause is accordingly remanded to the trial court with instructions to modify its judgment consistent with this opinion."

State v. Palmer, supra, 386 N.E.2d at 950. The entry of our judgment, as set out above, completed this cause to a finality, and left no issues to be decided by this Court or the trial court. The trial judge's only remaining duty on remand was to follow the instructions of this Court by striking the portion of his sentencing order which placed Palmer on probation, and by committing him to the Department of Corrections for a period of not less than ten nor more than twenty years, pursuant to the clear and mandatory language of §§ 35-13-4-4 and 35-7-1-1.

The mandate of this Court to this date has not been carried out by either Judge William Bontrager or Special Judge Richard Sproull. It is apparent that Judge Bontrager chose not to sentence Palmer as the law and our holding obliged him to do. Following the receipt of the certified opinion of this Court on June 8, 1979, Judge Bontrager set the matter for "further proceedings" on June

18. Over the objections of the State, Judge Bontrager thereafter held a series of hearings, the purpose of which was apparently to determine whether Palmer should, in fact, be sentenced for the statutory period. Palmer was permitted to call witnesses to attempt to prove that he had been rehabilitated since the time of his original sentencing, and that to force him now to serve his time would be nothing more than vindictive justice. Judge Bontrager continued the matter from time to time, and Palmer, through his counsel, was granted permission to call witnesses and take depositions of many individuals, including the Director of Corrections of Indiana.

On August 8, 1979, Judge Bontrager recused himself from the case and Special Judge Sproull purported to assume jurisdiction. Special Judge Sproull then began to pursue the same course of action Judge Bontrager had taken, permitting Palmer to offer evidence for the purpose of proving that he should not be made to serve his time, but should be allowed to continue on probation. Finally, on September 7, 1979, Judge Sproull did sentence Palmer. He stated in his order that he felt the original sentencing of Palmer was erroneous, that Palmer had been rehabilitated, and that it would be cruel and unusual punishment to have him serve the statutory time. Special Judge Sproull concluded that since this Court had ordered the sentence to be executed, he had no choice but to carry out that order. He then sentenced Palmer to not less than ten nor more than twenty years, and ordered that Palmer be given credit for the 365 days he had served. Special Judge Sproull denied Palmer's request for continued probation and ordered him to report to the Indiana Reception and Diagnostic Center on October 1, 1979. Judge Sproull then fixed an appeal bond in the sum of five thousand dollars, and instructed Palmer on the procedures to follow to appeal this judgment. Palmer filed the five thousand dollar appeal bond on September 11 and a motion to correct error on November 2. The motion to correct error was overruled on

January 31, 1980, and a motion for relief from the trial court's order was also denied on that date. This attempted appeal followed.

Thus, we now have before us documents which purport to be an appeal in a cause which has already been decided by this Court and in which no appealable issues remain. There is a right to appeal an error in the sentence imposed upon a guilty plea, but that right does not obtain in this case. *Weyls v. State*, (1977) Ind., 362 N.E.2d 481. Special Judge Sproull made it appear that he was following the directives of this Court by articulating the sentence required. However, he then permitted Palmer to be released by posting an appeal bond where no appeal was available. Because no appeal was available, Palmer had no right to be released under such pretenses.

This record presents to us nothing short of legal gymnastics by the regular judge and the special judge to avoid the clear duty facing them under the statutes, the order of this Court, and the oaths of their office; instead, they attempted to effect the result thought by them to be a better idea. Obviously, that idea was to have Palmer remain free, as indeed he has done to this day. If there is some persuasive reason or convincing philosphy why Palmer should not have to serve his time, those arguments should be directed to an application for executive clemency or perhaps a petition for postconviction relief. In the meantime, it is incumbent on the trial court and on this Court to follow the law.

The original appeal from the guilty plea and the sentencing thereon presented only one issue; there, the State challenged the jurisdiction of the trial court to put Palmer on probation when the statute prohibited him from doing so. We found in that appeal that the trial court had no authority to suspend Palmer's sentence and put him on probation, and we ordered that the trial judge sentence Palmer accordingly. A petition for rehearing was denied, and a certified opinion was issued to the trial judge. At that

point, there was nothing for the trial judge to do except follow our instructions by striking his suspension and probation order and committing Palmer to the Department of Corrections. There was nothing further for the trial court to hear or decide; therefore, there is nothing to be presented now to this Court for decision on appeal. This attempted appeal is a nullity, and any orders or findings by either trial judge, other than those showing compliance with the orders of this Court, are also null and void. Therefore, this appeal is dismissed, and this cause is again remanded to the trial court with orders to immediately commit Palmer to the Department of Corrections to serve the sentence imposed on him under the statute.

We further find that Judge William Bontrager and Special Judge Richard Sproull have directly violated a clear mandate of this Court in a manner that appears to be contemptible of this Court. Accordingly, an order shall issue forthwith directing both judges to personally appear before this Court and show cause why they should not be held in indirect criminal contempt of this Court. Judgment accordingly.

All Justices concur.

IN THE ELKHART SUPERIOR COURT No. 2

Cause No. 1136

(Filed Elkhart Superior Court No. 2—September 7, 1979)

State of Indiana,

v.

Harry Fred Palmer, III

FINDINGS OF COURT AND ORDER OF COMMITMENT

To: The Commissioner of the Department of Corrections of the State of Indiana

This cause is before the Court for the sentencing of the defendant, Harry Fred Palmer III. The Court having previously entered a judgment of conviction against the defendant for the commission of the crime of first degree burglary and sentenced the defendant on the 17th day of February, 1978, at which time the defendant was 25 years of age, and the Court, at that time, sentenced the defendant to the care, charge and control of the Department of Corrections of the State of Indiana for a period of not less than 10 years nor more than 20 years, and found that defendant should be disfranchised and rendered incapable of holding any office of trust or profit during the term of such incarceration. The Court, in this previous order of commitment, then suspended defendant's 10 to 20 year sentence and granted the defendant probation for a period of 5 years, and ordered an additional commitment to the Department of Corrections of the State of Indiana for 205 days, in addition to the 159 days having been previously served in the Elkhart County Jail. This order of commitment was appealed by the State of Indiana, and the Supreme Court of Indiana entered a decision on March 22, 1979, and found the judgment of the Court in sentencing to

be in error and remanded the case to this Court, with instructions to modify this judgment consistent with their opinion. Their opinion clearly implies that there can be no granting of probation on the facts and circumstances of this case, and that the original sentence of 10 to 20 years be imposed.

This Court has granted the defendant a right to a second pre-sentence hearing, and as a result of this hearing, much evidence has been presented to the Court to show that Harry Fred Palmer III has been rehabilitated, and that it would be cruel and inhuman punishment to return him to prison at this time. The Court refused to hear any evidence sought by the defendant to show that the Department of Corrections of the State of Indiana did not have the proper facilities for the care of this inmate and that the penal setting in fact is not a proper place for the incarceration of this defendant. This Court has ruled that such evidence would be irrelevant to this or any other inquiry upon the sentencing of any individual charged with a crime in Indiana, as it would be too burdensome upon the State to meet this objection in every case, and because this is not a proper tribunal and is not a hearing designed to test the propriety of the entire penal system.

During the hearing prior to the sentencing, however, the Court did hear a preponderance of the evidence showing that the defendant has indeed become rehabilitated, that he has complied fully with the terms of his probation, and further, that he is a family man, expecting a new child, and that it would indeed be a hardship upon him at this time to be re-committed to prison for an error committed not by himself, but by the original sentencing judge. Defendant raises the new constitutional issue of whether or not a commitment at this time would be such cruel and inhuman punishment as to be prohibited both by the Constitution of the State of Indiana and the Constitution of the United States. The defendant cited no Indiana cases to support this contention but did cite a California case in which the

Supreme Court of California found that to return a particular defendant to prison after he had been released following the State's appeal of an erroneous sentencing judgment would be unjust and cruel to that defendant. The case cited is *People v. Tanner* 156 Cal. Rptr. 450 (1979). The reasoning in the Tanner case could be easily applied to this case. However, the defendant in this case had been released from his incarceration on September 8, 1978, and the Supreme Court decision was filed on March 22, 1979, and the Court made no such finding in this case. It is possible that this issue was not raised in that appeal, and the Supreme Court of Indiana did not consider any evidence concerning the defendant's conduct and record after his initial release. Whether or not this would have made a difference, I do not know. I believe it is, in fact, cruel to return the defendant to prison to serve an additional period of time, as he has served a term fixed by the Court and has fulfilled his original sentence. It seems to be punishing him for a mistake not his own. It must be remembered, however, that the original crime to which he pled guilty and for which he was sentenced, called for a sentence of 10 to 20 years. The Supreme Court of Indiana has directed this Court to re-sentence the defendant to this term. Should they wish to reconsider their position in light of the new findings on the new hearing prior to this sentencing, they may have an opportunity to do so on appeal of this cause.

Accordingly, I now find that I must sentence the defendant as follows: The defendant shall be committed to the care, charge, custody and control of the Department of Corrections of the State of Indiana for a period of not less than ten nor more than twenty years, and further orders that the defendant be disfranchised and rendered incapable of holding any office of trust or profit during the term of such imprisonment, and further orders that the defendant pay and satisfy the costs of this action. The Court further orders that the defendant receive 159 days credit for time served prior to the imposition of the original

sentence and 205 days credit for the time previously served in the Department of Corrections, and all such credit shall be received at maximum good time earning rates.

The Court now denies the defendant's request for continued probation and orders the defendant to report to the Indiana Reception-Diagnostic Center on October 1, 1979, to begin serving the remainder of his sentence.

A copy of the transcript of the court proceedings on the re-sentencing of the defendant is ordered made a part of the record herein and to be sent to the Department of Corrections.

So ordered this 7th day of September, 1979.

/s/ Richard H. Sproull
Special Judge

IN THE ELKHART SUPERIOR COURT NO. 2

Cause No. 1136

(Filed Elkhart Superior Court No. 2—March 5, 1980)

State of Indiana

v.

Harry Fred Palmer, III

TRANSCRIPT OF JUNE 18, 1979 PROCEEDINGS

On June 18, 1979, the defendant appeared in open Court and the following proceedings were had, to-wit:

THE COURT: Harry Fred Palmer. Cause No. 1136 State vs. Palmer. Cause is coming on for further proceedings as to the defendant who appears in person. Present: David Stutsman of the Public Defender's Office; George Biddlecome, Deputy Prosecuting Attorney; Deputy Sheriff and other law enforcement officers.

Mr. Palmer on June 8, 1979, the Court received a certified copy of the Opinion of the Supreme Court of the State of Indiana upon rehearing in your case, reaffirming its decision that was initially entered on March 22, 1979.

Accordingly, the Court scheduled the matter for further proceedings today and notified the Probation Department and all counsel, and the Probation Department notified you to be present.

Mr. Stutsman, what is the defendant's desire at this point?

MR. STUTSMAN: At this time your honor, we would request a continuance of this proceeding for 60 days in order to allow us time to investigate the case and develop evidence to support our contentions as to why

the sentencing should not include an executed sentence in this case.

THE COURT: Mr. Biddlecome?

MR. BIDDLECOME: Your honor, the State objects to a continuance. May I have the cause number in this please?

THE COURT: I'm sorry?

MR. BIDDLECOME: May I have the cause number in this case?

THE COURT: It is 1136. I am going to grant the defendant's request for a continuance, sixty days we are talking August the 20th, 1977 at 9:00 A.M.

COURT REPORTER: Do you mean 1979?

THE COURT: Excuse me, what did I say?

COURT REPORTER: 1977.

THE COURT: I was only two years off.

MR. STUTSMAN: Was that August the 20th?

THE COURT: Yes, August 20th. All right, the matter will be set for further proceedings on August 20, 1979 at 9:00 A.M.

MR. BIDDLECOME: Your honor, the State would request that if evidence is to be elicited at that hearing that both sides be ordered to disclose the names of the witnesses, together with the substance of their testimony and their prior criminal records, some reasonable time prior to hearing. No less than two weeks.

THE COURT: All right, August 6th, parties are directed to make disclosure each to the other on or before August 6, 1979, of the names and identities, criminal records and other matters as contemplated by the Court's omnibus discovery order of those matters that will be sought for evidentiary purposes at the time of the further proceedings on August 20th.

MR. BIDDLECOME: Your honor, when you made your record did you show of record our objections?

THE COURT: Your objection is shown. All right Mr. Palmer, you are free to go.

IN THE SUPREME COURT OF INDIANA

No. 778 S 140

March 22, 1979

State of Indiana,

Appellant (Plaintiff Below),

v.

Harry Fred Palmer, III,

Appellee (Defendant Below)

APPEAL FROM THE ELKHART SUPERIOR COURT NO. 2 THE HONORABLE WILLIAM D. BONTRAGER, JUDGE

PIVARNIK, Justice.

This is an appeal by the State of Indiana from a criminal cause in which a state statute, Ind. Code § 35-7-1-1 (Burns 1975), was declared unconstitutional by the Elkhart Superior Court. The facts are not in dispute.

Defendant, Harry Fred Palmer III, was charged by way of information with first degree burglary in Elkhart County on September 12, 1977. The cause went through routine pleading stages and finally on January 16, 1978, the defendant withdrew a plea of not guilty and entered a plea of guilty to the charge of first degree burglary. A presentence investigation report was filed with the trial court by the probation office on February 8, 1978, and defendant was sentenced by the court on February 13, 1978. In his judgment, the trial court found the defendant guilty of first degree burglary, entered a judgment of conviction against him for said offense and sentenced him to the custody and control of the Department of Corrections of the State of Indiana for not less than ten nor more than twenty years, and further ordered that he be disfranchised and rendered

incapable of holding any office of trust or profit during the term of such incarceration. Following said sentencing, the defendant requested consideration of probation notwithstanding the clear directive of Ind. Code § 35-7-1-1 (Burns 1975), which states:

> "The several circuit and criminal courts and the city and municipal courts in the cities of the first and second class of this state, shall have power, in any case where any person shall have been convicted of a felony or misdemeanor, or shall have entered his plea of guilty to a charge of a felony or misdemeanor, upon the entry of judgment of conviction of such person, to suspend such sentence and parole such person, by an order of such court, duly entered of record as part of the judgment of the court in such case, except the crimes of murder, arson, first degree burglary, rape, treason, kidnapping, and a second conviction for robbery...."

After arguments by counsel and much discussion by the Court, the trial judge determined that even though the statute provides that the sentence shall not be suspendable for this crime, he would nevertheless suspend Palmer's sentence because he felt the statute was unconstitutional. The trial court accordingly made the finding that the interest of society did not demand that the defendant suffer the full penalty imposed by law in this case and provided that he serve 205 days under the jurisdiction of the Department of Corrections, receive credit for any time already served and that afterward he be released on probation for a period of five years under conditions to be established by the Probation Department.

It is the State's contention that because the Legislature had provided that the sentence for this crime was not suspendable, it was therefore mandatory that the trial judge fix the sentence provided by statute. The State further alleges that, in any event, the statute is not unconstitutional and the court erred in finding that it was.

Defendant contends that the statute is unconstitutional, and further, that the State has no authority to appeal this cause to the Supreme Court and that therefore this Court has no jurisdiction to consider the issue.

[1] Pursuant to our own Ind.R.Ap.P. 4(A)(8) this Court has exclusive jurisdiction over cases wherein a state statute has been declared unconstitutional. Defendant Palmer concedes this but contends that the Court's jurisdiction is not properly invoked under this rule unless the issue is presented in an appealable case. Ind.Code § 35-1-47-2 (Burns 1979) sets out the instances when the State may appeal in a criminal cause as follows:

> "Appeals to the Supreme Court may be taken by the state in the following cases:
>
> "First. From a judgment for the defendant, on quashing or setting aside an indictment or information, or sustaining a plea in abatement.
>
> "Second. From an order or judgment for the defendant, upon his motion for discharge because of delay of his trial not caused by his act, or upon his plea of former jeopardy, presented and ruled upon prior to trial.
>
> "Third. From a judgment of the court arresting judgment.
>
> "Fourth. Upon a question reserved by the state."

Defendant Palmer contends that since he was not acquitted then there is no provision under this statute giving the State the right to appeal. It has long been established that under the provisions of this statute, a state can appeal an error of the Court on a reserved question only if the defendant is acquitted. *State v. Sierp*, (1973) 260 Ind. 57, 292 N.E.2d 245; *State v. Arnold*, (1895) 144 Ind. 651, 42 N.E. 1095; *State v. Buckley*, (1978) Ind.App., 372 N.E.2d 1241. In *Sierp*, we provided as follows:

"The State vigorously disputes that we are without jurisdiction to determine this appeal, contending that our jurisdiction to hear appeals is not dependent upon legislative authorization. In this regard, it appears that both parties hereto have failed to distinguish between the authority of this Court to hear appeals and that of the state to prosecute them. True, the right of this Court to hear appeals is not dependent upon legislative enactment. *Bozovichar v. State*, (1951) 230 Ind. 358, 103 N.E.2d 680; *Warren v. Indiana Telephone Co.*, (1940) 217 Ind. 93, 26 N.E.2d 399. But, as we have heretofore demonstrated, the right of the State to prosecute criminal appeals is so dependent." *Sierp, supra*, at 260 Ind. 60, 292 N.E.2d 246.

[2] It is the contention of the State, however, that this is not a situation contemplated by the above statute as the trial court is not charged here with having committed normally appealable error. Here, after entering judgment against the defendant and fixing the sentence provided for in the statute, the trial judge admittedly acted directly in conflict with said statute and changed the judgment by reducing the sentence in a manner which the statute forbade. His reasons for doing this were apparently that he felt the statute unconstitutionally restricted trial court discretion in sentencing thus constituting cruel and unusual punishment in violation of U.S. Const., Amend. 8, and Ind.Const., Art. I § 16. In denying the state's Motion to Correct Errors, he expressly stated that the statute was constitutionally infirm.

To hold that this Court has no jurisdiction to act under these circumstances would appear to us to give meaning to the law, and to our pronouncements, that were never meant to be and that would tend to elevate form over substance in interpreting our law. It is the duty and jurisdiction of this Court to determine the constitutionality of the laws of this State. For the law to be universally administered, it is necessary for this authority to rest in but one place. This is the purpose, of course, of Appellate Rule 4(A)(8). Obviously,

if this were not so, constitutional interpretation could vary from one judicial circuit to another throughout the State. We have accordingly issued writs of mandamus when original actions were filed which showed that the trial court failed or refused to act in the manner required of it by the law. In *Ware v. State*, (1963) 243 Ind. 639, 189 N.E.2d 704, we held that a writ of mandate will lie against the respondent judge who failed to follow the statute by requiring and receiving a precommitment report by a probation officer before imposing sentence. And again in 1963, we held that a trial judge could properly be required, by writ of mandamus, to state his reason for suspending sentence and granting a parole according to the express provisions of the statutes before he took such action. *Palmer v. The Circuit Court of Hendricks County*, (1963) 244 Ind. 297, 192 N.E.2d 625. The trial court was accordingly ordered to vacate that part of his order which suspended the defendant from serving his sentence as the statute required and ordering him to reinstate the order of commitment. *See also State v. Arnold, supra.* Finally, in *State ex rel. Kelley v. Marion County Criminal Court, Division Three*, (1978) Ind. 378 N.E.2d 833, we issued a permanent writ against the trial judge ordering him to strike his decision granting a defendant a new trial, *sua sponte*, when the same was done after the time allowed for by law under Ind.R.Tr.P. 59(c).

It is true that this is not an application for a writ but is presented to us on a direct appeal by the State. If this question were raised in an original action filed by the State, we certainly would have authority to hear it and, on authority of the cases above cited and the law as it is established, would, of course, issue the writ. We have the same jurisdiction and authority to do, in the case of an appeal, that which we may do in a case raised by original action. We therefore proceed to the merits of the State's appeal.

[3, 4] The legislature has the authority to provide which acts shall be crimes in our society and to provide penalties therefor. It is, therefore, within their jurisdiction to provide for the length of sentences for offenses and to regulate the power of courts to grant or deny probation as they see fit. We have accordingly found that the granting of probation is a privilege governed exclusively by statute and one which confers no right upon any defendant. For example:

> "The granting of probation to a defendant, who is found guilty of a crime is wholly discretionary power of the trial court....Probation is purely a favor granted by the trial judge and there is no right to probation."

Farmer v. State, (1971) 257 Ind. 511, 515, 275 N.E.2d 783, 785-86. *See also, Hoffa v. State*, (1977) Ind., 368 N.E.2d 250. Insofar as Ind.Code § 35-7-1-1 (Burns 1975) restricts courts' discretion in suspending sentences for certain offenses, it is constitutional. *Cf. Bradley v. United States*, (1973) 410 U.S. 605, 93 S.Ct. 1151, 35 L.Ed.2d 528; *United States v. Del Toro*, (5th Cir. 1970) 426 F.2d 181, *cert. denied*, 400 U.S. 829, 91 S.Ct. 58, 27 L.Ed.2d 60; *Sperling v. Willingham*, (7th Cir. 1965) 353 F.2d 6, *cert. denied*, 384 U.S. 962, 86 S.Ct. 1591, 16 L.Ed.2d 675.

[5] The new penal code which changed the penalties and the provisions for probation for first degree burglary, went into effect on October 1, 1977, after the commission of the burglary by the defendant for which he was charged and herein convicted. The penalties and provisions for probation under the old law, in effect at that time, were applicable to this cause and not the new sentences and probationary provisions that were provided for at an effective date subsequent to the commission of the act, but prior to sentencing. *Holsclaw v. State*, (1979) Ind., 384 N.E.2d 1026; *Watford v. State*, (1979) Ind., 384 N.E.2d 1030; *Rogers v. State*, (1979) Ind., 383 N.E.2d 1035; *Beasley*

v. State, (1977) Ind., 370 N.E.2d 360; *State v. Turner*, (1978) Ind.App., 383 N.E.2d 428.

We accordingly hold that the trial court had no authority to enter an order suspending Palmer's sentence and was limited to sentencing the defendant under the provisions of the old code which were applicable at that time. The cause is accordingly remanded to the trial court with instructions to modify its judgment consistent with this opinion.

All Justices concur.

IN THE ELKHART SUPERIOR COURT No. 2

Cause No. 1136

(Filed Elkhart Superior Court No. 2—April 18, 1978)

State of Indiana

v.

Harry Fred Palmer, III

MEMORANDUM OPINION DENYING THE STATE'S MOTION TO CORRECT ERROR

On September 3, 1977, the defendant, HARRY FRED PALMER III, did, by his subsequent admission, commit the crime of First Degree Burglary. On September 12, 1977, he was charged on information and affidavit in this court with the commission of that offense. On January 16, 1978, he entered a plea of guilty to that offense. On February 13, 1978, this Court sentenced the defendant to the Department of Corrections of the State of Indiana for an indeterminate period of not less than 10 years nor more than 20 years with one hundred and fifty-nine (159) days of credit against said sentence for time spent in the Elkhart County Security Center. The Court then suspended the sentence imposed and place the defendant on probation with the first term and condition of probation being that the defendant would be committed to the Department of Corrections of the State of Indiana for an additional period of two hundred and five (205) days to be served without any good time credit or credit for time previously served meaning in short that the defendant would between Pre-Trial incarceration and Post Conviction incarceration serve a total of one (1) year of straight time. At the time of sentencing the Court had available to it the Pre-Sentence Report attached hereto and made a part hereof of as "Exhibit A".

Thereafter and on April 11, 1978, in timely fashion the State filed its Motion to Correct Error which the court has taken under advisement until the rendering of this opinion. The State in its motion raises the question of the legality of the Court's action and also raises the question of the basis of the court action.

To properly understand the matter as the Court sees it, the following statutory and constitutional references should be kept in mind:

Indiana Constitution, Article I, Section 16—

"Cruel and Unusual Punishments shall not be inflicted. All penalties shall be purportioned to the nature of the offense."

Indiana Constitution, Article I, Section 18—

"The Penal Code shall be founded on the principles of reformation and not of vindictive justice."

35-8-1(a)-9—

"No defendant convicted of a felony shall be sentenced before a written Pre-Sentence Report is prepared by a Probation Officer and considered by the sentencing Court."

I.C. 35-8-1(a)-5—

"The Court shall afford counsel for the defendant an opportunity to speak on behalf of the defendant. The defendant may also make a statement personally in his own behalf and, before pronouncing sentence, the Court shall ask him whether he wishes to make such a statement."

I.C. 35-8-1(a)-12—

"At any time prior to sentencing the convicted person may file with the court a written Memorandum setting forth any information he deems pertinent to the question of sentence. The convicted person may

attach written statements by others in support of facts alleged in the memorandum."

I.C. 35-8-1(a)-7—

Criterion for sentencing (effective October 1, 1977)—"(a) In determining what sentence to impose for a crime the Court shall consider the risk that the person will commit another crime, the nature and circumstances of the crime committed, and the prior criminal record, character, and condition of the person. (b) The Court may consider these factors as mitigating circumstances or as favoring suspending the sentence and imposing probation;...(c) The Court may consider these factors as aggravating circumstances or as favoring imposing consecutive terms of imprisonment;...(d) The criterion listed in subsections (b) and (c) of this section do not limit the matters that the Court may consider in determining the sentence."

I.C. 35-8-1(a)-3—Sentencing hearing (effective Oct. 1, 1977)—

"Before sentencing a person for a felony the Court must conduct a hearing to consider the facts and circumstances relevant to sentencing. The person is entitled to subpeona and call witnesses and otherwise to present information in his own behalf....."

I.C. 35-43-2-1—Burglary (effective Oct. 1, 1977)—

"A person who breaks and enters the building or structure of another person with intent to commit a felony in it, commits Burglary, a Class C Felony. However the offense is a Class B Felony if it is committed while armed with a deadly weapon or of the building or structure is a dwelling....."

I.C. 35-50-2-2—Suspension; Probation (effective Oct. 1, 1977)—

"The Court may suspend any part of a sentence for a felony unless..."

I.C. 35-50-1-1—Authority to Sentence (effective Oct. 1, 1977)—

"The Court shall fix the penalty of the sentence of a person convicted of an offense."

I.C. 35-7-1-1—

"The...Criminal Courts...shall have power...to suspend such sentence and parole such person...except the crimes of...First Degree Burglary..."

I.C. 35-1-47-2—

"Appeals to the Supreme Court may be taken by the State in the following cases: First, from a judgment for the defendant on quashing or setting aside an indictment or information or sustaining a plea in abatement. Second, from an order or judgment for the defendant upon his motion for discharge because of delay of his trial not caused by his act or upon his plea of former jeopardy presented and ruled upon prior to trial. Third, from a judgment of the court arresting judgment. Fourth, upon a question reserved by the State."

Appellate Review of Sentences—Rule 1—(effective Jan. 1, 1978)—

"(2) Appellate review of sentences under this rule may not be initiated by the State."

A.P. 4—

"(A) Appeals may be taken by either party from all final judgments of...Criminal...Courts. A Ruling or Order by the trial court granting or denying a Motion to Correct Errors shall be deemed a final judgment and an appeal may be taken therefrom. The Supreme Court shall have exclusive jurisdiction of:

(7) Appeals in criminal cases from judgments (sentences imposing a sentence of....greater than ten (10) years;

(8) Appealable cases where a State or Federal statute has been declared unconstitutional in whole or in part."

United States Constitution—Amendment 8—

"Excessive Bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

United States Constitution—Amendment 14, Section 1—

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Motion of the State of Indiana to correct error must be and it is hereby denied for each of the following reasons:

1. The provision above quoted of I.C. 35-7-1-1 purporting to make the sentence of conviction of First Degree Burglary nonsuspendible is in violation of Article I, Section 18, of the Constitution of the State of Indiana.

2. The provision of I.C. 35-7-1-1 purporting to make the sentence for conviction of First Degree Burglary nonsuspendible is unconstitutional under Article 1, Section 16, of the Constitution of the State of Indiana and under the 8th Amendment to the United States Constitution as made applicable to and enforceable upon the states of the United States pursuant to the 14th Amendment, Section 1, of the Constitution of the United States of America.

3. I.C. 35-43-2-1 and I.C. 35-50-2-2 of the Penal Code effective Oct. 1, 1977, are ameliorative of I.C. 35-13-4-4 (under which the defendant was charged herein) by virtue of allowing the suspension of the sentence for the crime of First Degree Burglary (now known as Burglary of a Dwelling) and is entitled to retroactive application.

4. The State of Indiana has no standing to institute an appeal of the sentence imposed by the Court.

The Court will not proceed to a discussion of each of the points set forth above.

I

I.C. 35-7-1-1, AS TO NONSUSPENDIBILITY OF CERTAIN OFFENSES, IS CONSTITUTIONAL (sic) AND IN VIOLATION OF ARTICLE I, SECTION 18, OF THE CONSTITUTION OF THE STATE OF INDIANA.

At the time of the writing of the Constitution of the State of Indiana, the draftsman of that Constitution included a provision unique, so far as this Court has been able to determine, in the anals of American Jurisprudence. Those draftsman stated that as a matter of public policy the Penal Code of the State should be founded on a principle of reformation and should not be founded upon a concept of vindictive justice. It is the position of this court that whenever the legislature seeks, as it has done in this instance, to declare that every individual committing a given offense must be incarcerated as a penalty then by so doing the legislature has acted upon vindictive justice and not in a spirit of reformation as they have totally failed to take into account the innate individuality of the person charged with the commission of an offense. For this proposition the Court acknowleges that it is unable to sight authority although certain citations that will be given in Part II of this opinion do have a bearing upon this issue as well. This Court does find it irreconcilable that a legislature which would state that a certain crime demands incarceration and takes away from the sentencing Judge any discretion at the time of sentencing whatsoever and yet in the same breath would enact or allow to stay upon the statutes of the State of Indiana statutes such as quoted above which: Require a Pre-Sentence Report; Require the defendant be given a right to be heard at sentencing;

Require the defendant be given the right to submit matters to the Court for consideration at the time of sentencing; Require a sentencing evidentiary hearing; Require that a Court set forth its criterion for imposing a sentence. In one breath the legislature says that sentences should be made with reference to the offense and the offender taking into account all possible information which can be received by the sentencing Judge and in the very next breath says that a computer can be installed upon the benches of the criminal courts to hand out the sentence programmed by the legislature. It is not necessary, however, to hold that the general assembly intentionally operated upon a philosophy of vindictive punishment at the time it passed the various provisions requiring nonsuspendibility but rather that the legislature acted without proper consideration of the Constitution of the State of Indiana.

The American public is at the time of the writing of this opinion being given an opportunity to view for nine and one-half (9 1/2) hours a detailed analysis of the development of the Nazi philosophy as the same applied to the Jewish community at and prior to World War II. That society in essence decreed that all Jews without regard to their actions or inactions should, upon conviction of being a Jew, be executed. Were the Indiana General Assembly to enact such a law; or enact a law that would provide that every person convicted of a speeding offense would be sentenced to 60 days in a penal institution or that every person convicted of littering must go to jail for 30 days, or in any other instance that the mind could conceive; no court in the land would hesitate to hold that such was vindictive punishment, grossly disproportionate to the nature of the offense, and strike down such a provision. The fact that we are here dealing with more severe offenses and, in the instance of the new Penal Code, dealing with second and subsequent offenses, makes no difference. The one is as violative of the constitution as is the other and must accordingly be stricken.

II

I.C. 35-7-1-1 IS VIOLATIVE OF ARTICLE I, SECTION 16, OF THE CONSTITUTION OF THE STATE OF INDIANA AND OF THE 8TH AMENDMENT OF THE UNITED STATES CONSTITUTION AS BEING CRUEL AND UNUSUAL PUNISHMENT.

It must first be recognized as a legal proposition that the 8th Amendment to the United States Constitution is applicable to and enforceable upon the separate states by virtue of the 14th Amendment, Section 1, to the United States Constitution. This Court would submit that the language differential between Article I, Section 16, of the Indiana Constitution and the 8th Amendment of the United States Constitution are inconsequential. Authority does exist for the proposition that uniform nondiscretionary mandatory sentences are in violation of the cruel and unusual punishment provisions.

The most recent of these cases is *Rummel v. Estelle*, 569 F. 2d 1193 (U.S. C.T.App. 5th Circuit 3/6/78). In that case the United States Court of Appeals, 5th Circuit, held that as to the defendant, William James Rummel, the statute of the State of Texas providing and mandating life imprisonment for an habitual offender was unconstitutional. The facts would set forth that Mr. Rummel had thrice been convicted of a felony: In 1964 for $80.00; in 1969 for $28.36; in 1973 for $120.75. The Court stated:

> "We hold that Rummel's life sentence is so grossly disproportionate to his crimes that it violates the cruel and unusual punishments clause...."

This, of course, makes the judgment of the 5th Circuit Court of Appeals a judgment of unconstitutionality as to the facts of the case and not an unconstitutional per se holding. In *Furman v. Georgia*, 92 S. Ct 2726 (1972), several of the justices of the United States Supreme Court took the time in a 100 plus page opinion to detail the historical development of the cruel and unusual punishment

provision. Numerous citations of authorities are set forth in that opinion. Justice Douglas writing for the majority stated and quoted favorably among other things the following remarks which are applicable here:

> "(2739) They intended in the Bill of Rights a prohibition upon "Cruel and Unusual Punishments" precisely because the legislature would otherwise have had the unfettered power to prescribe punishments for crimes."
>
> "(2742) The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings."
>
> "A punishment is excessive under this principle if it is unnecessary: The infliction of a severe punishment by the State cannot comport with human dignity when it is nothing more than the pointless infliction of suffering. If there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted, the punishment inflicted is unnecessary and therefore excessive."
>
> "(2748) It is unlikely that this Court will confront a severe punishment that is obviously inflicted in wholly abritrary fashion; no State would engage in a reign of blind terror....The test, then, will ordinarily be a cumulative one: If a punishment is unusually severe, if there is a strong probability that it is inflicted abitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then the continuted infliction of that punishment violates the command of the Clause that the State may not inflict inhuman and uncivilized punishments upon those convicted of crimes."

Later in the opinion Justice Berger writing for the minority added the following applicable remarks:

> "(2810) As a general matter, the evolution of penal concepts in this country has not been marked by great

> progress, nor have the results up to now been crowned with significant success. If any where in the whole spectrum of criminal justice fresh ideas deserve sober analysis, the sentencing and correctional area ranks high on the list. But it has been widely accepted that mandatory sentences for crimes do not best serve the ends of the Criminal Justice System. Now, after the long progress of drawing away from the blind imposition of uniform sentences for every person convicted of a particular offense, we are confronted with an argument perhaps implying that only the legislatures may determine that a sentence of death is appropriate, without the intervening evaluation of jurors or judges. This approach threatens to turn back the progress of penal reform, which has moved until recently at too slow a rate to absorb significant setbacks."

So has, in this Court's opinion, the Indiana General Assembly moved away from the slowly developing progress of penal concepts when it, in enactment of the Penal Code which became effective Oct. 1, 1977, dramatically expanded the number of offenses which were nonsuspendible. The legislature, however, did not stop with the Penal Code for in the 1978 General Assembly another Statute was passed which would require a 1 year incarceration of any person convicted of sale of any controlled substance in an amount of one (1) gram or more except marijuana. Later in the opinion Justice Blackmun, also writing for the minority, stated:

> "(2816) If the reservations expressed by my brother Stewart (which, as I read his opinion, my brother White shares) were to command support, namely, that capital punishment may not be unconstitutional so long as it be mandatorily imposed, the result, I fear, will be that statutes struck down today will be reenacted by state legislatures to prescribe the death penalty for specified crimes without any alternative for the imposition of a lesser punishment in the discretion of the Judge or Jury, as the case may be.

> This approach, it seems to me, encourages legislation that is regressive and of an antique mold for it eliminates the element of mercy in the imposition of punishment. I thought we had passed beyond that point in our criminology long ago."

The Court on appeal in the instant case will be given in the third and fourth parts of this opinion a ready means by which the arguments which this court has advanced in the first and second portions of the memorandum may be avoided. It is the opinion of this court that the constitutional issue should be met headon and squarely by the Court on review and that the opinions available in portions 3 and 4 of this opinion should not be utilized in an effort to duck the issue.

III

THE PENALTY FOR BURGLARY OF A DWELLING UNDER THE PENAL CODE BEING SUSPENDABLE IS AN AMELIORATIVE OF THE PENALTY FOR FIRST DEGREE BURGLARY.

There of course of late in the State of Indiana has been a developing body of case decisions holding that when a penalty is ameliorated, those defendants awaiting sentencing should and ought to receive the benefit of that amelioration: *Maynard v. State*, 367 NE 2d 5 (CA 3rd); *Wolfe v. State*, 362 NE 2d 188 (CA 2nd). This Court will accordingly not exhaustively examine the rationale of these decisions or reiterate the arguments which have undoubtedly been made to those courts. Suffice it to say that this Court believes that the instant case is one of the clearer reasons for the rationale of the amelioration concept. Early in 1976 the Indiana General Assembly by statute stated that in their wisdom the burglary of a dwelling should be a suspendible sentence. They made the effective date for that July 1, 1977. Again early in the year 1977 the General Assembly reexpressed its prior opinion but deferred the effective date to the 1st day of October,

1977. Unfortunately the defendant, HARRY FRED PALMER III, had the misfortune of committing his burglary of a dwelling on September 3, 1977. Had it not been for the legislative action of early 1977, the sentence of Mr. Palmer would be clearly suspendible; had Mr. Palmer deferred by 30 days the commission of his crime, his sentence would have been suspendible. The Pre-sentence Report will, of course, disclose prior felony convictions of the defendant which, under other terms of the Penal Code, would nevertheless have rendered his sentence nonsuspendible. That issue the Court has sought to attack in the first and second portions of this opinion. Be that as it may, the defendant did not enter his plea of guilty until after the effective date of the Penal Code nor was he sentenced until after the effective date of the Penal Code. This Court concurs with the language adopted Wolfe from *Dowdell v. State*, 336 N.E. 2d 699:

> "(702 N. 8) If the legislature had enacted an ameliorative amendment, the application of which would be constitutionally permissible to persons who had committed the crime prior to its effective date, we would be willing to find a statement of legislative intent to apply the sentencing provisions of that ameliorative statute to all persons to whom such application would be possible and constitutional.... If there is an express statement by the legislature that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the proscribed act, then to hold that the more severe penalty would apply would serve no purpose other than to satisfy a constitutionally and permissible desire for vindictive justice. We could not ascribe to the legislature an intent to punish for vindictive purposes."

It is interesting to note in an analysis of the Penal Code which became effective Oct. 1, 1977, how the General Assembly managed to pick and choose ameliorative retroactive impact. Two substantial places where that was

done were in the assignment of credit time classification and, secondly, in the granting to a defendant of any and all defenses created by the code that had not previously been existent. The Court merely points these matters out for consideration on the question of ameliorative impact of sentences.

IV

THE STATE HAS NO STANDING IN THIS APPEAL

It is the function of a Prosecuting Attorney to bring to the bar of justice those persons who, upon probable cause, have violated the criminal law of the state, county or municipality. Having brought that person before the bar, secured a conviction, and made argument as to what an appropriate sentence should be, the prosecutorial function ends. If acquittal be the result, the prosecutorial function does include certain limited rights of appeal. This Court, however, would respectfully submit that once the sentence is pronounced, whether that sentence be legal or illegal, the Prosecutor must then step aside. It may well be that the State of Indiana in some other entity, such as the Office of the Attorney General, may have a standing to appeal the questions presented by the Prosecuting Attorney in the Motion to Correct Error filed in this case. But is the opinion of this Court that the Prosecutor of Elkhart County has no such standing.

Additionally, however, this Court would respectfully submit that the State as an entity in any manner has no standing to appeal. I.C. 35-1-47-2 sets forth statutory grounds for appeal by the State, none of which exist in this case. The Rule for appellate review of sentences promulgated effective January 1, 1978, by the State Supreme Court provides specifically no right of appeal by the State in this instance. Only under AP 4 can an argument be made that the State of Indiana has a standing

to appeal in the instant case. However it was held in *State v. Eakins*, 348 N.E. 2d 681 (First District 1976):

> "As a condition to an appeal by the State upon a reserved question of law, there must have been an acquittal of the defendant based upon a finding of Not-Guilty."

Further, according to Eakins, the statutue, I.C. 35-1-47-2, provides the only right of appeal by the State to the exclusion of AP 4. In the instant case the defendant was charged with and plead Guilty to the offense of First Degree Burglary and accordingly no right to appeal under statute or rules exists. The holding of Eakins was reaffirmed in *State v. Buckley*, 372 N.E. 2d 1241 (Second District 1978).

For the above set forth reasons the Motion of the State to Correction Error is accordingly denied.

SO ORDERED this 18th day of April, 1978.

/s/ William D. Bontrager, Judge
Elkhart Superior Court No. 2.

CC. W. Richard Herron,
Counsel for Defendant.
Office of the State Public Defender.
Max K. Walker, Jr.,
Deputy Prosecuting Attorney.

IN THE ELKHART SUPERIOR COURT NO. 2

Cause No. 1136

(Filed Elkhart Superior Court No. 2—February 13, 1978)

State of Indiana,

v.

Harry Fred Palmer, III

ORDER OF COMMITMENT

TO: The Commissioner of the Department of Corrections of the State of Indiana

This cause having come on for sentencing of the defendant, Harry Fred Palmer, III, and the Court having entered a judgment of conviction against the defendant for the commission of the crime of first degree burglary, and having found the defendant's true age to be 25 years, and having conducted hearing on sentencing, the Court does now order the defendant committed to the care, charge, custody and control of the Department of Corrections of the State of Indiana for a period of not less than ten nor more than twenty years, and further orders that the defendant be disfranchised and rendered incapable of holding any office of trust or profit during the term of any such imprisonment, and further orders that the defendant pay and satisfy the costs of this action. Court further orders that the defendant have and receive 159 days credit for time served prior to disposition of these proceedings against the order of commitment imposed and that the defendant shall further receive credit against the order of commitment for any subsequent time served at the Department of Corrections, all such credit to be received at maximum goodtime earning rates.

Court further finds that the interest of society does not demand that the defendant at this time suffer the penalty

imposed by law and accordingly grants the defendant's request for probation and places the defendant on probation to the probation department of this court for a period of five years from this date, subject to the regular terms and conditions of probation which the Court orders the defendant to execute, and subject to the following additional terms and conditions of probation:

1. That the defendant shall be committed to the Department of Corrections of the State of Indiana for an additional period of 205 days to be served upon a court recommendation of maximum security and upon the further court recommendation at the Indiana State Reformatory, and the same to be served without any credit for goodtime previously earned or for goodtime earned while serving such additional 205 days, subject to all the terms and conditions imposed upon the defendant as an inmate of the Department of Corrections of the State of Indiana, violation of any which would be a violation of probation;

2. That upon the defendants release from the Department of Corrections at the end of said 205 days, the defendant shall participate in any psychiatric or substance abuse counseling as may be arranged by the probation department.

It is therefore considered, ordered, adjudged and decreed by the Court that the defendant, Harry Fred Palmer, III, be and he hereby is committed to the Department of Corrections of the State of Indiana to a date certain, namely the 6th day of September, 1978, without credit for prior time served or time served until said date, and the defendant is remanded to the custody of the Sheriff of Elkhart County for transportation to the Reception-Diagnostic Center of the State of Indiana.

So orderd this 13th day of February, 1978.

/s/ William D. Bontrager, Judge
Elkhart Superior Court No. 2

IN THE SUPREME COURT OF INDIANA

Cause No. 880 S 353

(Filed Supreme Court of Indiana—April 23, 1981)

Harry Fred Palmer, III,

Appellant,

v.

State of Indiana,

Appellee.

IN THE MATTER OF THE CONTEMPT OF WILLIAN D. BONTRAGER

APPLICATION OF WILLIAM D. BONTRAGER FOR REHEARING AND RECONSIDERATION TO BE SUBMITTED ON WRITTEN PLEADINGS

TO: THE SUPREME COURT OF INDIANA

On April 3, 1981, I received the formal opinion concerning the finding of indirect criminal contempt entered against me February 25, 1981. In light of that opinion I am respectfully requesting a re-consideration and rehearing on the issue of my contempt and would offer the following memorandum in lieu of a formal oral hearing. If it is the desire of the Court to hold a formal oral hearing, I will appear at the Court's convenience.

Respectfully submitted,

/s/ William D. Bontrager, Judge
Elkhart Superior Court No. 2

MEMORANDUM

From a review of the Opinion of March 31, 1981, it appears to me that the finding of contempt is based upon

the delay between June 8, 1979, and August 6, 1979, and that the Supreme Court has concluded:

> That I "totally failed to execute (the order)"; that I "unduly delayed responding to the orders of the Court (and that) that delay was obviously caused by (my) reluctance to follow those orders"; "that there was an attempt to trifle with the court and to circumvent a compliance with the orders of the court." Another foundation for the finding of contempt appears possible in the conclusion on page 5 of your opinion where it is stated: "*After* Judge Bontrager's unseemly delay of almost two months, he placed himself in a position where he could not execute our order, and recused himself from the case without ever having done so." (emphasis supplied)

Before proceeding to make an argument, the salient facts should once again be set forth. They are:

(1) On March 23, 1979, I received the unofficial opinion of the Supreme Court reversing my opinion of February 13, 1978.

(2) On June 8, 1979, I received the certified Opinion of the Supreme Court. I hold criminal matters on the Monday morning of each week. There was insufficient time to procure the presence of the defendant for a hearing on June 11, 1979, and I accordingly set the matter for June 18, 1979.

(3) On June 18, 1979, the defendant appeared in person and by counsel, which counsel had been appointed in the middle of April, 1979, but which counsel had not yet begun any preparation on the case as he was awaiting the certified opinion.

(4) This attorney, David Stutsman, a member of the Public Defender staff of this court, had never represented Mr. Palmer in the original proceedings leading to his sentencing in February, 1978, nor had he represented him in any of the appellate procedures.

(5) On June 18, 1979, counsel requested a continuance to prepare for the resentencing, which request, over objection of the State, I granted and set the matter for August 20, 1979.

(6) Effective July 1, 1979, David Stutsman, Court appointed counsel for the defendant and a member of the Public Defender staff of this court, left the Office of the Public Defender and on July 6, 1979, in conformation thereof his appearance was officially withdrawn on behalf of the defendant and a new member of the Public Defender staff of the court was appointed, to-wit: James Stevens.

(7) On July 31, 1979, the defendant for the first time commenced formal actions in court to attack the opinion of the Supreme Court entered June 8, 1979. This was done through the filing of a Notice of Depositions upon Written Question directed to the Department of Correction of the State of Indiana and a Motion to Delay Sentencing. I scheduled the Motion to Delay Sentencing for August 6, 1979, fourteen (14) days prior to the originally scheduled hearing.

(8) On August 1, 1979, Mr. Cosentino approached me and asked me to recuse myself from the case. This was nothing more than a request for Change of Venue for newly discovered cause, the cause being my actions and statements of March 26, 1979, and not the delay from June 18th to August 20th. I granted that Request. Mr. Sproull was eventually the Special Judge selected and ruled upon the various matters presented by the defense thereafter.

(9) Special Judge Sproull allowed the defendant to present factual issues through sworn testimony and legal issues through memorandums and entered his orders based thereupon September 7, 1979, being those issues which counsel had requested time to prepare on June 18th.

I recognize that in framing the facts set forth above I have that certain items included therein may be considered

argument but I feel that they are best presented in the form.

Before a conclusion of "unseemly delay" and/or an "attempt to trifle with the court" can be drawn, it seems to me that we must first answer the question of what rights Mr. Palmer had on June 8, 1979. I would submit that that question must be answered not in terms of your decision of January 30, 1981, but rather in terms of what a reasonable trial Judge should view those rights to be. For example, it was, of course, possible to have the Sheriff take Mr. Palmer into custody on, shall we say, June 9, 1979, (a Saturday) and deliver him before the court on June 11, 1979, and order him committed to the Department of Corrections of the State of Indiana without ever appointing counsel or allowing either the defendant or counsel to be heard. Just as obviously this would be an improper proceeding. I would submit therefore that any reasonable Judge attempting to do his job would conclude that the defendant was entitled to have counsel. Continuing with this hypothetical fact situation, let us assume that on June 11, 1979, counsel was appointed and appeared before the Court and the Court then asked for counsel's comments and following those comments, whatever they may have been, ordered the defendant committed to the Department of Corrections. Obviously counsel would have been totally unprepared and therefore would have been "incompetent" in the best meaning of that term. I would therefore submit that any reasonable Judge was entitled to grant that counsel a continuance to familiarize himself with the case and the reason for being in court. The less contact that counsel had had in the past with the case, then the more time would be appropriate to grant for the continuance.

I concede that a two months continuance appears to be a "unseemly delay." But was it in fact or would it appear "unseemly" to a reasonable trial Judge? In order to answer that I would submit that we must look at what the

defendant subsequently argued in front of Special Judge Sproull. In your opinion of March 31, 1981, you said:

> "Special Judge Sproull felt, however, that Palmer did have a right to make a record and raise the due process issues he felt were applicable to him; Sproull then permitted him to do so, to facilitate presentation of those issues to this court for review.....Thus all concerned agreed that Palmer should be permitted to make a record of those issues and thereafter should be permitted to perfect an appeal to this court....."
>
> "Even though we feel Special Judge Sproull was incorrect in his analysis of the questions in this cause.....We have a reasonable doubt whether his actions and intentions amounted to indirect criminal contempt of this court...."

What Mr. Palmer in fact argued before Special Judge Sproull was the following:

> Should I, having served the original sentence imposed, having been free thereafter, and all of this occurring before my sentence was determined to be illegal, have to go back to prison for an error of the Sentencing Judge?

The very first thing that counsel for defendant Palmer needed to determine was whether or not that issue had been raised and argued before the Supreme Court of Indiana in 1978 and early 1979. In short, was the issue known to the Supreme Court when it ruled on June 8, 1979, and was it responded to? If it was known and responded to, then the defendant could be immediately resentenced. But if it was not known or not responded to then the defendant (at least I would submit to a reasonable Judge) would be considered to have the right to present the issue. This is what you found as to Judge Sprouil and my only action was to fix a period of time for the defendant to raise the issue. It is all well and good to say, in hindsight, that Mr. Palmer did not have any issues to raise. But when a defendant approaches a trial Court and cites the Supreme Court of the State of

California (*People v. Tanner*, 156 CAL. RPTR. 450 (1979)) and a Federal District Court (*US v. Denson*, 588 F.2d 1112 (1979)) and then holds before that trial Judge your opinion of June 8, 1979, which is silent on the very issue those two cases present—am I to ignore it; was I to deny it summarily without hearing; et cetera. Those are question that I had to answer on June 18, 1979, without any guidance other than the language in your original opinion which said:

> "The cause is accordingly remanded to the trial court with instructions to modify its judgment consistent with this opinion."

What more am I to say? If there was even a scintilla of evidence in the record on my contempt proceedings to allow even an inference that I granted defense counsel's request for continuance in order to "trifle with the court" or to in essence say "regardless of what the Supreme Court has decided I intend to keep Mr. Palmer free", then I can understand the finding of contempt. But I most respectfully would submit that there is no such scintilla of evidence within the record.

I then withdrew myself from the case and apparently that action is being construed as contempt. If it is construed as contempt, it must mean that the Court has concluded that I withdrew myself for no other reason than to avoid having to in fact pronounce the sentence ordered by you in your opinion of June 8, 1979. In fact in your opinion of March 31, 1981, you say:

> "*After* Judge Bontrager's unseemly delay of almost two months he *placed* himself in a position where he could not execute our order and recused himself from the case without ever having done so." (emphasis supplied)

I respectfully submit that there is not a scintilla of evidence in the record to support the proposition that I at any time went out and did any act for the purpose and intent of allowing myself to withdraw from the case and avoid

complying with your order. What the evidence does disclose is that in March of 1979, two and one-half months before the official opinion was handed down, I did and said things that caused the Prosecuting Attorney of Elkhart County to conclude that he could not receive a fair and impartial consideration of the issues that were raised by Mr. Palmer in August and September of 1979 before me, and for that reason the Prosecutor requested a change of venue for newly discovered cause and I granted that request. The Indiana Code of Judicial Conduct, Canon 3(C)(1)(a) says:

> "A Judge should disqualify himself in a proceeding in which his impartiality *might reasonably be questioned*, including but not limited to instances where he has a personal bias or prejudice concerning a party, or personal knowlege of disputed evidentiary facts concerning the proceeding." (emphasis supplied)

Again the actions that placed me in that position of questionable impartiality occurred two and one-half months before your decision of June 8, 1979, and did not occur after two months of delay. In your opinion of March 31, 1981, you seem to acknowledge that I was correct in withdrawing myself when you say:

> "Judge Bontrager recognized the validity of Cosentino's assertions; he also recognized that his attitudes were generally known and highly publicized in the community. For those reasons he recused himself and provided for the selection of a Special Judge to continue the cause."

In summary, it remains my belief that the record of these proceedings does not support a finding of contempt and I would most respectfully request your reconsideration of such finding.

Respectfully submitted,

/s/ William D. Bontrager, Judge
Elkhart Superior Court No. 2

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 23rd day of April 1981 a copy of the above and foregoing Application for Rehearing and Reconsideration was duly deposited in the United States mail, postage prepaid, addressed to Mr. Linley Pearson, Attorney General for the State of Indiana, 219 State House, Indianapolis, Indiana 46204 and to the Supreme Court of Indiana.

/s/ William D. Bontrager, Judge
Elkhart Superior Court No. 2

IN THE SUPREME COURT OF INDIANA

Cause No. 880 S 353

(Filed Supreme Court of Indiana—February 6, 1981)

Harry Fred Palmer, III,

Appellant,

v.

State of Indiana,

Appellee.

VERIFIED RESPONSE TO CONTEMPT CITATION BY RESPONDENT WILLIAM D. BONTRAGER, JUDGE, ELKHART SUPERIOR COURT No. 2

Comes now WILLIAM D. BONTRAGER, Judge of the Elkhart Superior Court No. 2, Respondent in the contempt citation issued January 30, 1981, and for response to said citation and after being first duly sworn upon his oath, deposes and says:

1. That on February 13, 1978, at the time of sentencing the defendant Harry Fred Palmer, III, your affiant as Judge of the Elkhart Superior Court No. 2 made certain rulings concerning the constitutionality of certain statutes of the State of Indiana and pursuant to said rulings placed the defendant, Harry Fred Palmer, III, following his plea of guilty and conviction on the offense of First Degree Burglary, upon probation, ordering as term and condition of probation that he service a period of two hundred five (205) days at maximum security at the Department of Correction of the State of Indiana.

2. That thereafter the State of Indiana filed Motion to Correct Error which your affiant on April 18, 1978, denied. Thereafter the State sought appeal to the Supreme Court of the State of Indiana of your affiant's actions.

3. Thereafter and on or about September 6, 1978, while said appeal was pending the defendant, Harry Fred Palmer III, was released by the Department of Corrections of the State of Indiana pursuant to the order of the court entered at the time of sentencing.

4. That on or about March 23, 1979, your affiant received a copy of the opinion of Justice Pivarnik entered in the case of Harry Fred Palmer III reversing the rulings of your affiant.

5. That shortly thereafter and on a date unknown to your affiant, your affiant called or wrote the Office of the Administrator of the Supreme Court to receive guidance in the case of Mr. Palmer because the opinion which was received was not certified. Your affiant was then informed (I believe by letter although I do not have a copy of the same) that no action needed to be taken by virtue of the fact that time still remained for the defendant to request rehearing and no opinion would be official until the time for request for rehearing had passed or rehearing had in fact occurred.

6. Thereafter your affiant held conversations with representatives of the Prosecuting Attorney's office in Elkhart County concerning this matter. Because both the Court and the Prosecuting Attorney's office were concerned about the possible import of the defendant's right to be sentenced within 30 days, your affiant did then on April 20, 1979, direct communication to the Honorable Alfred J. Pivarnik for clarification and received response from the said Honorable Alfred J. Pivarnik dated May 3, 1979 (copies attached). In the meantime, however, your affiant set the matter for further proceedings April 23, 1979, and ordered the defendant to appear. The defendant did appear on said date and at the request of the defendant, the proceedings were continued until official opinion of the Supreme Court was handed down. At the same time, your affiant appointed the Office of the Public Defender of the court to represent the defendant in all further proceedings.

7. Thereafter and on or about June 8, 1979, your affiant received a copy of the official opinion of the Supreme Court of the State of Indiana and immediately set the matter for further proceedings on June 18, 1979. Said further proceedings were held and at that time the defendant requested a continuance of 60 days for the purpose of securing evidence for presentation at a sentencing hearing pursuant to I.C. 35-4.1-4-3 and to give the local Public Defender an opportunity to review the case. Over objection of the Prosecuting Attorney your affiant granted said request and scheduled the matter for August 20, 1979, ordering disclosure by both parties of any witnesses and the substance of their testimony to be taken at the time of such further hearing.

8. Thereafter and on July 31, 1979, the defendant by counsel filed a "Notice of Depositions Upon Written Questions" and a "Motion to Delay Sentencing." At that time your affiant set the Motion to delay sentencing for August 6, 1979. No action was necessary upon the Notice of Deposition, the State having the responsibility to contest said notice. On August 1, 1979, and upon request of the Prosecuting Attorney of Elkhart County your affiant continued the hearing on the Motion to Delay Sentencing to August 13, 1979.

9. On or about August 1, 1979, your affiant was approached by Michael A. Cosentino, elected Prosecuting Attorney of Elkhart County. Mr. Cosentino at that time discussed very candidly with your affiant the matter of whether or not your affiant was in a position of a conflict of judicial ethics by remaining upon the case in that any further actions which your affiant would take in the case might well hold the judicial system up to ridicule and disrepute. Your affiant concluded, based upon that conversation, that Mr. Cosentino was correct and accordingly recused himself from the case. At that time, your affiant offered Mr. Cosentino an alternative: he would certify the matter to the Supreme Court of the State of

Indiana for the selection of a Special Judge or name a panel of three prospective Special Judges from which the parties might alternatively strike with the understanding that no name would be placed upon such panel unless such attorney would first indicate his willingness to accept appoint (sic) if he were ultimately selected. Mr. Cosentino informed the Court that he would be agreeable to the second alternative. Your affiant then contacted defense counsel who indicated that the second alternative was also acceptable to them. Your affiant then contacted several attorneys including Richard Sproull, William J. Nye and Charles Grodnik (I do not recall if other attorneys were approached at that time) and asked each one of them if they would be willing to serve if selected. Each one of those three said that they would and I accordingly named them as a special panel. Thereafter the State struck Mr. Nye, the defense struck Mr. Grodnik and Mr. Sproull appeared and qualified as Special Judge.

10. After this action was completed your affiant had no further action in connection with the case and never discussed the case with Mr. Sproull.

11. The transcript of the proceedings both before the undersigned as Judge of the Elkhart Superior Court No. 2 and before Mr. Sproull will speak for itself as to our respective actions both prior to and after August 6, 1979.

12. On August 24, 1979, Mr. Sproull granted the State's Motion for Protective Orders as to the discovery sought by the defendant and scheduled the matter for further sentencing hearing September 5, 1979. Thereafter and on September 5, 1979, Mr. Sproull granted the State's Motion in Limine prohibiting certain testimony sought to be adduced by the defendant at the sentencing hearing and conducted the sentencing hearing. On September 7, 1979, Mr. Sproull announced his decision in the case. On November 2, 1979, the defendant filed his Motion to Correct Error and a Motion for Relief from Order of court. Mr. Sproull held hearings upon said motions on January

31, 1980, and denied both of said motions on that date. On February 12, 1980, your affiant received the original but unofficial opinion of the Supreme Court of the State of Indiana in the case of *State of Indiana versus Ozzie Lane Lawson* (Supreme Court 1278-S-302), a case presenting nearly identical issues to the issues presented in the case of Mr. Palmer. It was at that time the opinion of your affiant that his actions in March and April of 1979 concerning the case of Mr. Palmer equally prejudiced both parties and had equal potential for holding the judiciary to disrepute, and, accordingly, your affiant recused himself from the case of Ozzie Lane Lawson. Your affiant again offered to the parties the same options as offered in the matter of Mr. Palmer, that is, the certification to the Supreme Court for appointment of Special Judge or the appointment of a panel of special Judges for alternative striking. Both parties then agreed to accept Mr. Sproull as Special Judge if Mr. Sproull was willing to serve even though both parties knew that Mr. Sproull had heard the Palmer case, knew his decisions and rationales therein, and fully expected the same results would occur as occurred in Palmer. Mr. Sproull did accept and did appear and qualify as Special Judge. Subsequent proceedings in the case of Ozzie Lane Lawson as indicated by the attached docket sheet, bear a very close resemblance to the case of Harry Fred Palmer III and in fact resulted in the same type of determination by Special Judge Sproull. The only difference is that Special Judge Sproull has not yet ruled upon the Motion to Correct Error filed by the defendant Ozzie Lane Lawson on August 26, 1980.

13. The Court would further point out that the Prosecuting Attorney did not object to the posting of appeal bond or the right of the defendant to post an appeal bond in accordance with the order of Mr. Sproull and that such actions at a minimum should show the good faith of your affiant and Mr. Sproull.

14. Your affiant intends to supplement this response by affidavits from Prosecuting Attorney Michael A.

Cosentino, Deputy Prosecuting Attorneys Max K. Walker, Jr. and George Biddlecome. In the opinion of the Supreme Court of the State of Indiana handed down January 30, 1981, an issue is raised concerning the right of the defendant, Harry Fred Palmer III, to seek executive clemency. Your affiant respectfully attaches to this response correspondence from and to Mr. Howard Zehr as to efforts that were made on behalf of the defendant, Harry Fred Palmer III, towards executive clemency. Your affiant would further respectfully show that on January 31, 1981, following receipt by your affiant and Mr. Sproull of the opinion of the Supreme Court of January 30, 1981, your affiant and Mr. Sproull met and collectively caused Bench Warrants to issue for the rearrest of not only Harry Fred Palmer III but also Ozzie Lane Lawson, both of whom peaceably surrendered themselves to the Sheriff of Elkhart County and are at this time in the custody of the Sheriff of Elkhart County. Your affiant spoke with the Administrator of the State Supreme Court on February 2 and 3, 1981, to seek guidance from the Supreme Court as to who should exercise the further jurisdiction over Mr. Palmer and Mr. Lawson, that being your affiant or Mr. Sproull. I received such instructions on February 3, 1981, and will remand both said defendants to the Department of Corrections on February 17, 1981.

15. Further your affiant saith not.

/s/ William D. Bontrager, Judge

STATE OF INDIANA)
) SS:
COUNTY OF ELKHART)

Personally appeared before me, Clerk of the Elkhart Superior Court No. 2, the above named William D. Bontrager, who after being first duly sworn upon his oath, did depose and say that the matters set forth above are true

and correct to the best of his knowledge, information and belief.

/s/ William D. Bontrager

/s/ Peter A. Sarantos, Clerk
Elkhart Superior Court No. 2

IN THE SUPREME COURT OF INDIANA

Cause No. 880 S 353

(Filed Supreme Court of Indiana—February 6, 1981)

Harry Fred Palmer, III,

Appellant (Defendant Below)

v.

State of Indiana,

Appellee (Plaintiff Below)

AFFIDAVIT

Comes now Michael A. Cosentino, and after first being duly sworn upon his oath deposes and says:

1. That this Affiant has practiced law in the County of Elkhart, Indiana, since 1963, and was elected Prosecuting Attorney, 34th Judicial Circuit, Elkhart County, Indiana, in November, 1974, and re-elected in November, 1978, and is presently serving in such capacity.

2. That as Prosecuting Attorney of the 34th Judicial Circuit, Elkhart County, Indiana, the undersigned is familiar with the above captioned criminal matter.

3. That subsequent to the sentencing of Harry Fred Palmer, III by the Honorable William D. Bontrager on February 13, 1978, the Elkhart County Prosecutor's Office in conjunction with the Office of the Attorney General of the State of Indiana, determined that an appeal of the sentencing order was appropriate and necessary.

4. That thereafter the appellate process was commenced by the Elkhart County Prosecutor's Office in conjunction with the Indiana Attorney General's Office.

5. That subsequent to the date on which the Supreme Court remanded the subject cause of action to the Elkhart

Superior Court No. 2 for sentencing in accordance with the Supreme Court's Order, this Affiant became aware of the personal and emotional involvement of the Honorable William D. Bontrager with the subject Defendant.

6. That as a result of the Honorable William D. Bontrager's personal and emotional involvement in the subject criminal cause of action, it was this Affiant's feeling that it would have been difficult, if not impossible, for him to serve as a Judge for further proceedings in the subject cause of action.

7. That the undersigned on August 1, 1979, at 1:00 o'clock p.m., spoke with the Honorable William D. Bontrager in his chambers and suggested to him that he should recuse himself as Judge for the purpose of further proceedings in the subject cause of action.

8. That it is this Affiant's understanding that as a result of this Affiant's conversation with the Honorable William D. Bontrager, that the Honorable William D. Bontrager did thereafter recuse himself from the subject cause of action and appoint a panel from which the Special Judge would be selected.

9. Subsequently, Richard H. Sproull, an attorney in Elkhart, Indiana, was selected and qualified as Special Judge in the subject cause of action.

10. That the undersigned has known the said Richard H. Sproull for approximately seventeen (17) years, and has had numerous occasions to be involved in cases, both civil and criminal, in which the said Richard H. Sproull was opposing counsel. That at all times, the said Richard H. Sproull has conducted himself in a manner in accordance with the highest ethics of the legal profession.

11. That the undersigned has known the said Honorable William D. Bontrager for approximately fourteen (14) years, and has had several occasions in which the Honorable William D. Bontrager was acting as

opposing counsel in civil cases. Further, the undersigned has had the occasion to be involved in several civil and criminal cases in which the Honorable William D. Bontrager has been the Presiding Judge of the Elkhart Superior Court No. 2.

12. Although this Affiant has, at times, emphatically disagreed with the various rulings, orders and policies of the Honorable William D. Bontrager in his capacity as Judge of the Elkhart Superior Court No. 2, it is the opinion of the undersigned that the said Honorable William D. Bontrager is a man of the highest integrity and impeccable honesty.

/s/ MICHAEL A. COSENTINO
Prosecuting Attorney
34th Judicial Circuit
State of Indiana

STATE OF INDIANA)
) SS:
COUNTY OF ELKHART)

Subscribed and sworn to before me this 4th day of February, 1981.

My Commission Expires:
July 23, 1984

/s/ Mary L. Hunsberger, Notary Public
Residing in Kosciusko County, Indiana

APPENDIX B

CONSTITUTIONAL PROVISIONS

The Eighth Amendment to the Constitution of the United States provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The first section of the Fourteenth Amendment to the Constitution of the United States provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 1, §12 of the Constitution of Indiana provides:

> "All courts shall be open; and every man, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay."

Article 1, §16 of the Constitution of Indiana provides:

> "Excessive bail shall not be required. Excessive fines shall not be imposed. Cruel and unusual punishments shall not be inflicted. All penalties shall be proportioned to the nature of the offense."

Article 1, §18 of the Constitution of Indiana provides:

> "The penal code shall be founded on the principles of reformation, and not of vindictive justice."

STATUTORY PROVISIONS

IC 35-13-4-4(a) (Burns 1975) provides:

> "Whoever breaks and enters into any dwelling house or other place of human habitation with the intent to commit any felony therein, or to do any act of violence or injury to any human being, shall be guilty of burglary in the first degree, and on conviction thereof shall be imprisoned not less than ten [10] years nor more than twenty [20] years and be disfranchised and rendered incapable of holding any office of trust or profit for any determinate period."

IC 35-7-1-1 (Burns 1975) provides in relevant part:

> "The several circuit and criminal courts and the city and municipal courts in the cities of the first and second class of this state, shall have power, in any case where any person shall have been convicted of a felony or misdemeanor, or shall have entered his plea of guilty to a charge of a felony or misdemeanor, upon the entry of judgment of conviction of such person, to suspend such sentence and parole such person, by an order of such court, duly entered of record as a part of the judgment of the court in such case, except the crimes of murder, arson, first degree burglary, rape, treason, kidnapping, and a second conviction for robbery, whenever such court, in the exercise of its judgment and discretion, shall find and determine that such person has committed the offense for which he or she has been convicted under such circumstances as that, in the judgment of such court, such person should not suffer the penalty imposed by the law for such offense if he or she shall thereafter behave well, or whenever such court shall find and determine that by reason of the character of such person, or the facts and circumstances of such case, the interest of society does not demand or require that such person shall suffer the penalty imposed by law if he or she shall thereafter behave well."

IC 35-50-2-2(a)(2) (effective October 1, 1977) provides:

"(a) The Court may suspend any part of a sentence for a felony unless:

• • •

(2) The felony committed was murder (IC 35-42-1-1); battery (IC 35-42-2-1) with a deadly weapon; kidnapping (IC 35-42-3-2); confinement (IC 35-42-3-3) with a deadly weapon; rape (IC 35-42-4-1) with a deadly weapon; criminal deviate conduct (IC 35-42-4-2) with a deadly weapon; child molesting (IC 35-42-4-3) as a class A or class B felony; robbery (IC 35-42-5-1) resulting in serious bodily injury or with a deadly weapon; arson (IC 35-43-1-1) for hire or resulting in serious bodily injury; burglary (IC 35-43-2-1) resulting in serious bodily injury or with a deadly weapon; resisting law enforcement (IC 35-44-3-3) with a deadly weapon; escape (IC 35-44-3-5) with a deadly weapon; rioting (IC 35-45-1-2) with a deadly weapon; or dealing in a narcotic drug (IC 35-48-4-1) as a class A felony."

IC 35-8-1A-2 provides:

"Upon entering a conviction the court shall set a date for sentencing within thirty [30] days, unless for good cause shown an extension is is [sic] granted. If a presentence report is not required, the court may sentence the defendant at the time the judgment of conviction is entered. Provided, however, That the court may not pronounce sentence at such time without inquiring as to whether an adjournment is desired by the defendant. When an adjournment is requested, the defendant shall state the purpose thereof and the court may, in its discretion, allow a reasonable time for adjournment."

IC 35-8-1A-3 provides:

"Before sentencing a person for a felony the court must conduct a hearing to consider the facts and circumstances relevant to sentencing. The person is

entitled to subpoena and call witnesses and otherwise to present information in his own behalf. The court shall make a record of the hearing, including:

(1) a transcript of the hearing;

(2) a copy of the presentence report; and

(3) if the court finds aggravating circumstances or mitigating circumstances, a statement of the court's reasons for selecting the sentence that it imposes."

Canon 3(C)(1)(a) of the Indiana Code of Judicial Conduct provides:

"(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;"

Opposition

Office - Supreme Court, U.S.
FILED
OCT 26 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-501

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

HONORABLE WILLIAM D. BONTRAGER,
Judge of the Elkhart Superior Court No. 2,
Petitioner,

vs.

SUPREME COURT OF INDIANA, and
STATE OF INDIANA, and
HARRY FRED PALMER III,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF INDIANA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a trial judge may be held in indirect criminal contempt of an appellate court where, on remand from an initial unauthorized criminal sentence, he fails to correct the sentence and order commitment as instructed by the appellate court, but instead sets the matter for "further proceedings", grants the defendant a sixty day continuance of sentencing, and then recuses himself.

2. Whether it was shown that Judge Bontrager had the requisite intent to be found guilty of indirect criminal contempt.

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No. 81-501

IN THE

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HONORABLE WILLIAM D. BONTRAGER,
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SUPREME COURT OF INDIANA, and
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HARRY FRED PALMER III,
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ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF INDIANA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, the State of Indiana and the Supreme Court of Indiana,[1] respectfully pray this Court to deny the petition for writ of certiorari, seeking review of the opinion of the Supreme Court of Indiana in this case because a substantial federal question is not raised.

[1] This is a criminal contempt case and an independent cause; petitioner has erroneously captioned his petition to include Harry Fred Palmer III, a party to the cause out of which Judge Bontrager's criminal contempt arose.

OPINION BELOW

The Supreme Court of Indiana entered an opinion in this cause on March 31, 1981. This opinion may be found in Petitioner's Appendix at A-2 and is unofficially reported at 418 N.E.2d 530. The unpublished order of the Supreme Court of Indiana denying rehearing and reconsideration was entered on June 17, 1981 and appears in Petitioner's Appendix at A-1.

JURISDICTION

The Supreme Court of Indiana entered its judgment and opinion in this case on March 31, 1981. Petitioner tendered a petition for rehearing and reconsideration on April 23, 1981, more than twenty (20) days from the rendition of the decision. Indiana Appellate Rule 11(A) provides that a petition for rehearing may be filed "within twenty (20) days from the rendition of the decision." Therefore, contrary to petitioner's assertion at page 7 of his petition, his petition for rehearing and reconsideration was not timely filed. The Supreme Court of Indiana denied the petition without indicating whether it was considered on its merits. Under these facts, the petition for rehearing does not enlarge the time to petition for a writ of certiorari. *See Pfister v. Northern Illinois Finance Corp.* 317 U.S. 144 (1942). Additionally, even assuming for the sake of argument that the period of time to petition for certiorari was enlarged by the untimely petition for rehearing, the petition for certiorari was not filed within 60 days of the denial of the petition for rehearing as required by Supreme Court Rule 20.1.[2] Therefore, the petition now before this Court was not timely filed and is jurisdictionally defective.

---

[2] *Dale v. State*, 198 Ind. 110, 150 N.E. 781 and *State v. Shumaker*, 200 Ind. 623, 157 N.E. 769, 162 N.E. 441 (1927), cited by petitioner for the proposition that an indirect criminal contempt proceeding is not a criminal case, actually hold far less. These cases merely hold that a criminal contempt is not a criminal case for change of venue purposes, for the application of certain rules of evidence, and that such

(Footnote continued on following page)

STATEMENT OF THE CASE

Petitioner seeks review of the opinion of the Supreme Court of Indiana entered on March 31, 1981 finding petitioner in indirect criminal contempt of that court. The contempt action concerned petitioner's failure to follow the directive of the Supreme Court of Indiana in the case of *State v. Palmer*, 386 N.E.2d 946 (Ind. 1979).

On January 16, 1978 Harry Fred Palmer entered a plea of guilty to a charge of first degree burglary before the Honorable William D. Bontrager ("Judge Bontrager"). Subsequently, on February 13, 1978, Judge Bontrager found Palmer guilty and sentenced him to serve a term of not less than ten nor more than twenty years. However, although IC 35-7-1-1 at that time provided that the sentence for first degree burglary was not suspendible, Judge

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Continued

convictions may not be pardoned by the Executive. However, in *Bloom v. Illinois*, 391 U.S. 194 (1968) this Court held that criminal contempt is a crime in every fundamental respect:

> Criminal contempt is a crime in the ordinary sense: it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both. In the words of Mr. Justice Holmes:
>
> "These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech." Gompers v. United States, 233 U.S. 604, 610, 34 S.Ct. 693, 695, 58 L.Ed. 1115 (1943).
>
> Criminally contemptuous conduct may violate other provisions of the criminal law; but even when this is not the case convictions for criminal contempt are indistinguishable from ordinary criminal convictions, for their impact on the individual defendant is the same. Indeed, the role of criminal contempt and that of many ordinary criminal laws seem identical—protection of the institutions of our government and enforcement of their mandates. (footnotes omitted) 391 U.S. at 200, 201.

Additionally, in *O'Neal v. United States* 190 U.S. 36, 38 (1903), this Court held that an adjudication for contempt is "in effect a judgment in a criminal case." Thus, even assuming *arguendo* that petitioner's untimely petition for rehearing tolled the time to petition for certiorari, this petition was not filed within the sixty days of the denial of the petition for rehearing as required in a criminal case under Supreme Court Rule 20.1.

Bontrager found the statute unconstitutional and order Palmer committed to the Department of Corrections for a period of 205 days and placed him on probation for a period of five (5) years.

The State appealed from this judgment and the Supreme Court of Indiana in *State v. Palmer*, ___ Ind. ___, 386 N.E.2d 946 (1979) held *inter alia* that IC 35-7-1-1 was constitutional and that Judge Bontrager erred in suspending Palmer's sentence and held,

> "We accordingly hold that the trial court had no authority to enter an order suspending Palmer's sentence and was limited to sentencing the defendant under the provisions of the old code which were applicable at that time. The cause is accordingly remanded to the trial court with instructions to modify its judgment consistent with this opinion."
>
> 386 N.E. 2d at 950.

Judge Bontrager received a certified copy of the opinion on June 8, 1979. Thereafter, Judge Bontrager set the matter for "further proceedings" on June 18, 1979. On that date, over the State's objection, Judge Bontrager continued "sentencing" to August 20, 1979 and further directed that the parties disclose all witnesses and evidence to be introduced at the "further proceedings" by August 6. On August 6, Judge Bontrager recused himself from the cause without ever having modified the sentence as instructed by the Supreme Court of Indiana.

On August 8, Richard M. Sproull qualified as Special Judge in the cause. Special Judge Sproull conducted a hearing on August 24, 1979 concerning various motions that were pending under Judge Bontrager. He denied Palmer's motion to delay sentencing and held a sentencing hearing on September 5, 1979. On September 7, Special Judge Sproull sentenced Palmer to serve a term of ten to twenty years, with credit for time already served. He also set an appeal bond for Palmer in the amount of $5,000.00. Palmer was released on bond on September 11, 1979.

Palmer attempted to appeal the judgment of Special Judge Sproull. On January 30, 1981, the Supreme Court of Indiana issued a written opinion in *Palmer v. State*, ___ Ind. ___, 415 N.E.2d 707 (1981) dismissing Palmer's attempted appeal and ordering Palmer to be committed to the Department of Corrections immediately (Petitioner's Appendix at A-16). Concurrently, the court issued an order (Petitioner's Appendix at A-15) which required Judge Bontrager and Special Judge Sproull to personally appear before the Supreme Court of Indiana on February 25, 1981 to show cause why they should not be held in indirect criminal contempt.

Judge Bontrager filed a verified response to the order to show cause on February 6, 1981. On February 25, 1981 Judge Bontrager and Special Judge Sproull appeared in person and by counsel at a hearing before the Supreme Court of Indiana. At the hearing, it was shown that both judges understood the order in *State v. Palmer, supra*, and knew that it was mandatory that Palmer be sentenced to a ten-to-twenty year term and committed to the Department of Corrections. Judge Bontrager, while not denying the facts of record, spoke in mitigation, claiming a lack of intent to be contemptuous of the Court.

At the February 25 hearing, Judge Bontrager was found in indirect criminal contempt for failing to carry out the Court's mandate. He was sentenced to a definite term of thirty (30) days imprisonment and fined in the amount of five hundred dollars ($500.00). The prison term was suspended and the fine was ordered paid on or before March 5, 1981. The Court further ordered that Judge Bontrager's conduct be referred to the state's Judicial Qualifications Commission for investigation. While the Court found that Special Judge Sproull improperly allowed Palmer to be free on bond after his commitment, his actions and intentions were not found to constitute indirect criminal contempt.

The official opinion in the contempt proceeding was handed down on March 31, 1981. Petitioner's untimely

petition for rehearing and reconsideration was filed on April 23, 1981 and was denied without opinion on June 17, 1981. (Petitioner's Appendix at A-1).

REASONS FOR DENYING THE WRIT

The Petition for a Writ of Certiorari fails to raise a substantial federal question and does not warrant further review.

The power to punish for contempt is inherent in the authority of courts. *Doyle v. London Guarantee & Accident Co.*, 204 U.S. 599, 607 (1907). The importance of the contempt power to the judiciary was emphasized by this Court in the case of *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1910):

> For while it is sparingly to be used, yet the power of courts to punish for contempts is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law. Without it they are mere boards of arbitration whose judgments and decrees would be only advisory. 221 U.S. at 450.

All orders and judgments of courts must be complied with promptly. *Maness v. Meyers*, 419 U.S. 449 (1975). Petitioner in the case at bar does not argue that the Supreme Court of Indiana was without jurisdiction to enter its order of March 22, 1979 or that the order was unclear. Rather, petitioner attempts to justify his failure to comply with the order by expressing his concern for Palmer's due process rights. Such concerns cannot justify a trial court in refusing to obey an appellate court order. "Persons who make private determinations of the law and refuse to obey an order generally risk criminal contempt even if the order is ultimately ruled incorrect." *Maness v. Meyers, supra*, 419 U.S. at 591.

In any event, however, it is clear that at no time were Palmer's constitutional rights in jeopardy. Petitioner's argument that immediate compliance with the Indiana

Supreme Court's order would have denied Palmer his constitutional right to counsel[3] ignores the reality that Palmer had already been sentenced prior to his original appeal. Judge Bontrager had but one duty following remand: to strike the portion of his sentencing order which placed Palmer on probation, and to order Palmer committed to the Department of Corrections for the mandatory statutory sentence[4] of not less than ten nor more than twenty years. Petitioner's argument that Palmer was entitled to the assistance of counsel in preparation for a full-blown sentencing hearing assumes that there was some question concerning the sentence to be imposed. Emphatically, there was not.

Petitioner's argument that he recused himself in order that Palmer enjoy the benefit of an impartial tribunal is similarly flawed. Any suggestion of bias or prejudice was not raised until well after Judge Bontrager's order continued the modification of sentence hearing. Following receipt of the Indiana Supreme Court's order of March 22, 1979, Judge Bontrager's duties were purely ministerial. Judge Bontrager was under a duty to follow the clear directive of the Indiana Supreme Court by striking the portion of his sentencing order which placed Palmer on probation, and to commit him to the Department of Corrections for a period of not less than ten nor more than twenty years.[5]

Finally, petitioner argues that the record discloses an absence of any intent on the part of Judge Bontrager to defy

---

[3] Judge Bontrager shifts his position from mitigation urged before the Indiana court. (*Compare*, Opinion, A-5 *with* his Verified Return to Contempt Citation, A-59 at 60,61).

[4] IC 35-13-4-4; IC 35-7-1-1

[5] Among the reasons given by Judge Bontrager for not modifying the sentence, rehabilitation of the defendant would be more properly presented in an application for executive clemency and any purely legal grounds could have been raised in a petition for post conviction relief. (*see*, Opinion dimissing appeal, A-19).

the resentencing order. However, petitioner does not dispute the finding of the Indiana Supreme Court that he understood the order, nor does he dispute the finding that he failed to comply with the order for a period of sixty days prior to recusing himself. Intent is a mental function which may be inferred from all the surrounding facts and circumstances in evidence. *Hicks v. State*, 397 N.E.2d 973 (Ind. 1979); *Cooper v. State*, 165 Ind. App. 471, 332 N.E.2d 843, (Ind. App. 1975). Additionally, intent may be inferred from one's reckless disregard of his obligation to a court. *In re Allis*, 531 F.2d 1391 (9th Cir. 1976) *cert. denied* 429 U.S. 900. Judge Bontrager was aware of the nature of the resentencing order and what it required, yet he failed to obey the order and instead conducted "further proceedings" in defiance of it. These facts support the inference that Judge Bontrager acted in willful disobedience of the order of the Supreme Court of Indiana. A trial court judge owes a particularly strong duty of obedience. "The greater the power that defies the law the less tolerant can this Court be of defiance." *United States v. United Mine Workers*, 330 U.S. 258, 31 (1947) (concurring opinion of Justice Frankfurter); *See also United States v. An Undetermined Quantity of an Article of Drug Labeled as Benylin Cough Syrup*, 583 F.2d 942 (7th Cir. 1978).

The Indiana Supreme Court properly found that Judge Bontrager, in failing to obey its order, was guilty of indirect criminal contempt.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
OCT 28 1981
ALEXANDER L. STEVAS
CLERK

No. 81-501

IN THE

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OCTOBER TERM, 1981

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vs.

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondents, Supreme Court of Indiana and State of Indiana,[1] in their opposing brief, in an obvious attempt to

[1]Petitioner was notified on October 9, 1981, that respondent, Harry Fred Palmer, III, has no interest in the outcome of the petition due to a pending state clemency petition filed by Mr. Palmer's counsel.

obfuscate and confuse jurisdictional matters relating to this cause, have erroneously, if not conveniently, applied appellate procedural rules where trial procedural rules apply, in an original action, to Judge Bontrager's petition for rehearing and reconsideration (Petitioner's Appendix at A1), misstated the holdings in *Dale v. State*, 198 Ind. 110, 120-121, 150 N.E. 781 (1926) and *State v. Shumaker*, 200 Ind. 623, 693, 157 N.E. 769, 162 N.E. 441 (1927), while improperly classifying the indirect criminal contempt action against Judge Bontrager as a criminal case when the Indiana Supreme Court has uniformly, without exception, held it to be a *civil* case. Compounding the foregoing errors, respondents have omitted relevant facts set forth in the Petition highlighting the absurdity of the respondents' position.

JURISDICTION

A.
PETITIONER TIMELY FILED HIS APPLICATION FOR REHEARING AND RECONSIDERATION

Respondents' efforts to misapply appellate rules where trial rules are applicable, while miscalculating time periods for filing petitions for rehearing and reconsideration are, at best, inappropriate, if not simply misleading. It is undisputed that the Supreme Court of Indiana entered its judgment and opinion in this case on March 31, 1981, *Palmer v. State*, ___ Ind. ___, 418 N.E.2d 530 (1981).[2] Judge Bontrager received a copy of the Indiana Supreme Court's formal opinion on *April 3, 1981*, by certified mail (Petitioner's Appendix, A51) and on April 23, 1981, filed an application for rehearing and reconsideration.[3] It must be

---

[2]The opinion in *Palmer v. State*, ___ Ind. ___, 418 N.E.2d 530 (1981), appears in the Petitioner's Appendix, A2-8.

[3]The Application Of William D. Bontrager For Rehearing and Reconsideration To Be Submitted On Written Pleadings appears in the Petitioner's Appendix, A51-58.

emphasized that the indirect criminal contempt proceeding against Judge Bontrager before the Indiana Supreme Court was an *original action;* in fact, *a trial* and *not* an appeal. However, to indulge in the procedural fantasies raised by the respondents, and apply the relevant provisions of the Indiana Rules of Appellate Procedure, it is still evident that Judge Bontrager's application for rehearing and reconsideration was timely filed.

Appellate Rule 11(A), Indiana Rules of Appellate Procedure, provides, in relevant part, that:

> "(A) *Rehearings.* Application for a rehearing of any cause may be made by petition, separate from the briefs, signed by counsel, and filed with the clerk within twenty (20) days from rendition of the decision, stating concisely the reasons why the decision is thought to be erroneous...."

Conjunctively, Appellate Rule 12(D), Indiana Rules of Appellate Procedure, states that:

> "(D) *Extension of Time for Service by Mail.* In any and all cases where motions, petitions, briefs *and other papers* are served upon the opposing party or his counsel by mail or with any properly bonded carrier, the time period specified for the filing of any answers or briefs with the clerk in response thereto shall be *extended automatically* and without order of court *for an additional period of five days* from the date of such deposit in the United States Mail or with any properly bonded carrier."
>
> (Emphasis supplied)

Thus, even assuming that the Supreme Court of Indiana mailed its opinion and judgment to Judge Bontrager on the date of issuance; to-wit: on March 31, 1981, no responsive application or petition for rehearing or reconsideration was due until April 25, 1981, which, being a Saturday, further extended the filing date to the following Monday,

April 27, 1981, pursuant to Appellate Rule 13, Indiana Rules of Appellate Procedure.[4]

The foregoing indulgence does not obviate the fundamental fact that since the original indirect criminal contempt action was a trial, the Indiana Rules of Trial Procedure applied to that proceeding. As succinctly explained in *State v. Shumaker, supra*, an original action in the Supreme Court of Indiana charging two attorneys and the leader of the "Anti-Saloon League of Indiana" with indirect criminal contempt of that court:

> "Respondent has filed his petition for a rehearing, which is not materially different in its attack upon the majority opinion and finding in this case than was presented by his motion for a new trial. This case originated in this court. It was tried here, and any ruling of the court at which either party may feel aggrieved may be properly presented by a motion for a new trial."
>
> 200 Ind. at 697.

---

[4]Appellate Rule 13, Indiana Rules of Appellate Procedure, provides that:

> "In computing any period of time prescribed or allowed by these rules, by order of the court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed is to be included unless it is:
> (1) a Saturday;
> (2) a Sunday;
> (3) a legal holiday as defined by state statute; or
> (4) a day the office in which the act is to be done is closed during regular business hours.
> In any event, the period runs until the end of the next day that is not a Saturday, a Sunday, a legal holiday, or a day on which the office is closed. When the period of time allowed is less than seven (7) days, intermediate Saturdays, Sundays, legal holidays, and days on which the office is closed shall be excluded from the computations. This rule shall not apply to the filing of petitions requesting extensions of time under Appellate Rule 14."

A motion for a new trial under current Indiana trial rules is now called a "Motion to Correct Error"[5] which must be filed not later than *sixty* (60) days after the entry of a final judgment or an appealable final order. Trial Rule 59, Indiana Rules of Trial Procedure.[6] Applying the correct procedural rules, Judge Bontrager had until June 1, 1981, within which to file his "Motion to Correct Error" or "Motion for New Trial" or "Application for Rehearing and Reconsideration," however denominated.

As applied in *State v. Shumaker, supra*, the Indiana Supreme Court has uniformly held that "pleadings are to

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[5]The grounds of a motion to correct error, as with its predecessor, a motion for a new trial, are set forth in Trial Rule 59(A), Indiana Rules of Trial Procedure, which states:

"(A) *Motion to correct error—Bases for.* The bases for a motion to correct error are established, without limitation, as follows:

(1) Denial of a fair trial by any irregularity in the proceedings of the court, jury or prevailing party, or any order of court, abuse of discretion, misconduct of the jury or prevailing party;

(2) Accident or surprise which ordinary prudence could not have guarded against;

(3) Excessive or inadequate damages, amount of recovery or other relief;

(4) The verdict or decision is not supported by sufficient evidence upon all necessary elements of a claim or defense, or is contrary to the evidence specifically pointing out the insufficiency or defect;

(5) Uncorrected error of law occurring and properly raised in the proceedings or prior to, at or subsequent to the trial;

(6) Newly discovered material evidence which could not, with reasonable diligence have been discovered and produced at the trial;

(7) Correction of a judgment subject to correction, alteration, amendment or modification; or

(8) The verdict or decision being contrary to law specifically pointing out the insufficiency or defect;

(9) For any reason allowed by these rules, statute or other law."

[6]Trial Rule 59(C), Indiana Rules of Trial Procedure, states:

"(C) *Time for filing: Service on judge.* A motion to correct error shall be filed not later than sixty [60] days after the entry of a final judgment or an appealable final order. A copy of the motion to correct error shall be served, when filed, upon the judge before whom the case is pending pursuant to Trial Rule 5."

be examined and treated as to their content rather than their captions," *McQueen v. State*, ___ Ind. ___, 396 N.E.2d 903, 904 (1979) ("Verified Motion To Vacate Finding and Judgment" considered as a motion to correct error); *Loftin v. Johnson*, 216 Ind. 537, 24 N.E.2d 916, 918 (1940). Otherwise stated, "[t]he nature of a pleading is not determined by its title but rather by its contents." *State ex rel. Morvilius v. State*, 241 Ind. 199, 170 N.E.2d 825 (1960); *Hawkins v. Jenkins*, ___ Ind. ___, 374 N.E.2d 496, 498 (1978); *Morris v. State*, 263 Ind. 370, 332 N.E.2d 90, 92 (1975).

Applying either the appropriate Indiana Rules of Trial Procedure or the inapplicable Indiana Rules of Appellate Procedure, Judge Bontrager's filing of a motion for a new trial, motion to correct error, or application for rehearing and reconsideration was timely, thereby preserving jurisdiction in this Court.

B.

AN INDIRECT CRIMINAL CONTEMPT IS NOT A CRIMINAL CASE UNDER INDIANA LAW

In view of the respondents' erroneous characterization of the holdings in *Dale v. State* and *State v. Shumaker, supra*, it is necessary to review verbatim the applicable portions of those indirect criminal contempt actions. Supportive of the petitioner's contention that an indirect criminal contempt action is *not* a criminal case, the Indiana Supreme Court stated in *Dale v. State* that:

> "It has been decided by this court as well as by the courts of other jurisdictions that a matter of a contempt of court is neither civil nor criminal, although it partakes of the nature of both. *State v. Newton* (1878), 62 Ind. 517, 520; *Township of Noble v. Aasen* (1901), 10 N.D. 264, 267.

• • •

> It has been argued heretofore in various jurisdictions that a contempt in the classification as a criminal contempt is a criminal case. But the courts have never adopted this conclusion. *The courts have uniformly held that a criminal contempt is not a criminal case even though the act that is held to be contemptuous was itself an act made criminal by statute.* The courts have gone so far in this direction that it has been held that one may not only be fined and imprisoned for contempt for a certain contemptuous act, but that he may be also charged with the commission of a statutory crime in an indictment for the same act, and the finding or verdict in such a case is not contrary to law, after having been found guilty of contempt, because of former jeopardy. It may not be successfully denied that the trial and punishment for a direct contempt is entirely summary, which necessarily implies that the court acts upon the instant in pronouncing the punishment upon such an offender."
>
> (Emphasis supplied)
> 198 Ind. at 120-121.

In *State v. Shumaker, supra*, the Indiana Supreme Court reiterated its position that:

> "But in no instance has it been shown to this court by respondent that any jurisdiction has held that any character of contempt of court is a crime within the meaning of the Constitution. The differentiation of the character of contempts came by their names by judicial definition, and statutes using the characterization merely adopt the name given by the courts. So that *proceedings for contempt of a court are not criminal proceedings in the sense or under the definition as used in the Constitution or as defined by statute.*"
>
> (Emphasis supplied)
> 200 Ind. at 723.

Continuing in its analysis that an indirect criminal contempt is *not* a criminal case, the Court explained that:

> "From the foregoing it is held that *a charge which prefers a contempt against a court is not a criminal action*; that it is not an offense within the meaning of that word in §17 of Art. 5 of the Constitution, which grants to the executive power to pardon; that, by reason of the inherent power of the court to receive a charge of contempt and to try the cause, it has the power to enforce the execution of its judgment, notwithstanding the power to pardon granted to the executive department—the Governor."
>
> (Emphasis supplied)
> 200 Ind. at 725.

Indeed, no rules of criminal procedure apply to indirect criminal contempt proceedings:

> "While this proceeding may be classed as one for criminal contempt, yet by no means is it a criminal action in the sense that the rules for the admission of evidence in a criminal case apply."
>
> 200 Ind. at 693.

Conclusively, *no* decision of the Indiana Supreme Court has ever held that an indirect criminal contempt is a criminal case. Perhaps that is why respondents failed to cite any Indiana authority for their unmeritorious, spurious assertion. Accordingly, Judge Bontrager's filing of his application for rehearing and reconsideration on April 23, 1981, and the filing of his petition for writ of certiorari to the Supreme Court of Indiana were both timely, vesting this Court with jurisdiction over this case pursuant to Supreme Court Rules 20.2 and 20.4 and 28 U.S.C. §§2101(c) and 1257(3).

CONCLUSION

Petitioner respectfully prays that a Writ of Certiorari to the Supreme Court of Indiana be granted.

Respectfully submitted,

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Amicus Brief

MOTION FILED
OCT 26 1981

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Respondents.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE.

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE.

California Attorneys for Criminal Justice (CACJ) and the National Association of Criminal Defense Lawyers, Inc. (NACDL) hereby respectfully move for leave to file the attached brief *amicus curiae* in this case. The consent of the attorney for the petitioner has been obtained. The urgency of immediate filing of this brief precluded a request to the respondents for consent.

California Attorneys for Criminal Justice is a statewide organization of approximately, 1700 attorneys whose practices emphasize the defense of individuals accused of crime. The National Association of Criminal Defense Lawyers, Inc. is a District of Columbia non-profit corporation whose membership is comprised of more than 2,000 lawyers, citizens of every state of the union, all of whom are primarily

engaged in positions bringing them in daily contact with the Criminal Justice System as advocates, law professors, and judges of the state and federal courts. Among the stated objectives of both organizations is the promotion of fairness in the adjudication of criminal cases in the courts of the United States.

Amici submit this brief because they view the judgment and opinion of the Supreme Court of Indiana which is being challenged by the petitioner as a threat to the right of every criminal defendant to have his or her case heard by a judge who is neutral, detached and willing to fully consider claims that constitutional rights are being violated. The chilling effect of the action taken by the Indiana Supreme Court in this case will be felt by all trial judges who preside over criminal cases. Their resulting reluctance to exercise independent judgment will adversely affect thousands of the criminal defendants who appear before them. CACJ and NACDL are uniquely qualified to present arguments concerning the potential adverse impact of this case upon those accused of crime. Together, the two organizations include 3,700 attorneys who appear on a daily basis before the trial judges who preside in criminal cases. Those appearances frequently include presentation of claims that the constitutional rights of the accused have been violated, as well as requests that a judge disqualify himself or herself for bias. If a trial judge can be punished for merely granting a hearing of constitutional claims, the potential impact upon the rights of all criminal defendants to be heard should be fully considered. If a trial judge is to be disciplined for disqualifying himself for bias after a suggestion by the prosecutor that he

do so, the potential impact upon the rights of all criminal defendants to a neutral and unbiased judge should be thoroughly explored.

Respectfully submitted,

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BRIEF AMICUS CURIAE.

Interest of the Amicus Curiae.

California Attorneys for Criminal Justice is a statewide organization of approximately 1,700 attorneys whose practices emphasize the defense of individuals accused of crime. The National Association of Criminal Defense Lawyers, Inc. is a District of Columbia non-profit corporation whose membership is comprised of more than 2,000 lawyers, citizens of every state of the union, all of whom are primarily engaged in positions bringing them in daily contact with the Criminal Justice System as advocates, law professors, and judges of the state and federal courts. Among the stated objectives of both organizations is the promotion of fairness in the adjudication of criminal cases in the courts of the United States.

REASONS FOR GRANTING THE WRIT.

1. PERMITTING A STATE SUPREME COURT TO PUNISH A TRIAL JUDGE FOR ALLOWING A CRIMINAL DEFENDANT AN OPPORTUNITY TO PRESENT A CLAIM OF DENIAL OF CONSTITUTIONAL RIGHTS WILL HAVE A CHILLING EFFECT UPON THE RECEPTIVENESS OF OTHER TRIAL JUDGES TO CLAIMS RAISED BY CRIMINAL DEFENDANTS THAT THEIR RIGHTS UNDER THE UNITED STATES CONSTITUTION HAVE BEEN VIOLATED.

In holding Judge Bontrager in indirect criminal contempt for granting new counsel a sixty day continuance to prepare for hearings on a new claim of denial of his client's constitutional rights, the Indiana Supreme Court viewed the function of a trial judge after a remand for resentencing as simply that of an automaton. Even when the discretion of the sentencing judge is limited by a statute requiring the imposition of a mandatory sentence, as it was here, the judge may be called upon to consider constitutional claims of substantial magnitude. The imposition of sentence is not a mere formality. In this respect, the decision of this Court in *Mempha v. Rhay*, 389 U.S. 128 (1967) is instructive. There, the state argued that counsel was unnecessary at the imposition of sentence following probation revocation, because the imposition of sentence was a "mere formality" since the applicable statute required the trial judge in all cases to impose the maximum term. This Court carefully reviewed the applicable state statutes to find several instances where "certain legal rights may be lost if not exercised at this stage." 389 U.S. at 135. It should be noted that under Indiana law, numerous issues may be raised at the time of sentencing calling for the exercise of discretion by the sentencing judge even when the actual sentence is mandated by statute:

(1) The judge may order a physical or mental examination of the accused. IC 35-50-1A-11.

(2) The judge may order disclosure of information in a presentence report. IC 35-50-1A-13.

(3) At the time of the sentencing in this case, the judge apparently had discretion to impose costs. IC 35-50-1-3 (Burns 1975).

Each of these issues could easily implicate substantial constitutional rights of the accused. It seems incongruous to hold that the jeopardy to a defendant's rights even when a mandatory sentence is being imposed constitutionally requires the assistance of counsel, but all requests by counsel for time to adequately prepare to assert those rights can be required to be denied under pain of contempt by the trial judge.

The message conveyed to all trial judges by the action of the Indiana Supreme Court is a clear one. Any request to delay the immediate execution of a remand from an appellate court should be summarily denied. If it is not, the consequences will go far beyond a mere reversal for abuse of discretion: immediate punishment of the offending judge by fines and/or jail sentences can be meted out. How many state trial court judges will be willing to risk the wrath of appellate courts under such circumstances? How many criminal defendants will encounter a receptive ear for their constitutional claims with such a Damoclean sword suspended over the judge's head?

The situation imposed upon a trial judge under these circumstances is not unlike the situation condemned by this Court in *Tumey v. Ohio*, 273 U.S. 510 (1927) and *Ward v. Village of Monroeville*, 409 U.S. 57 (1972). In both of these cases, this Court found intolerable a situation in which the judge presiding over a criminal case had a pecuniary interest in reaching a conclusion against the defendant.

Here, the interest of the trial judge is more than pecuniary. If he rules in favor of the defendant's request for a continuance, he risks not only his personal fortune, but his liberty as well. This Court would hardly hesitate to strike down a state law providing that a trial judge who improperly rules in a defendant's favor shall have $500 deducted from his salary. Yet isn't that precisely the effect created by the ruling of the Indiana Supreme Court in this case?

To allow this judgment to stand would be a "great step backward," depriving all criminal defendants "of that judicial independence which helps insure fearless and even-handed dispensation of justice." *Palmore v. United States*, 411 U.S. 389, 419 (1973) (Douglas J., dissenting). The concluding words of Justice Douglas in his *Palmore* dissent are directly applicable to this case:

> "Those who hold the gun at the heads of Superior Court judges can retaliate against those who respect the spirit of the Fourth Amendment and the Fifth Amendment and who stand firmly against the ancient practice of using the third degree to get confessions and who fervently believe that the end does not justify the means." 411 U.S. at 422.

2. PERMITTING A STATE SUPREME COURT TO PUNISH A TRIAL JUDGE FOR RECUSING HIMSELF IN A CASE WHERE HIS IMPARTIALITY HAS BEEN CHALLENGED WILL DISCOURAGE ALL TRIAL JUDGES FROM GIVING FAIR CONSIDERATION TO REQUESTS FOR RECUSAL.

The suggestion that a judge recuse himself because of bias calls for a sensitive examination of conscience. The judge must ask himself or herself, "Can I continue to preside over this case without bias, and without creating the appearance of bias?" If the ruling of the Indiana Supreme Court in this case is allowed to stand, trial judges will be required to ask themselves another question: "Can I afford

to pay a fine or go to jail if I do not continue to preside over this case?" It is respectfully suggested that the mere putting of that question to a trial judge impinges upon a criminal defendant's right to have his case heard by a neutral and impartial judge.

As held by this Court in *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), the Due Process Clause of the Fourteenth Amendment guarantees a criminal defendant in state proceedings "a trial before a disinterested and impartial judicial officer." 409 U.S. at 58. There, the threat to impartiality was a mayor's responsibilities for revenue production. The "possible temptation" that the mayor, in presiding over traffic court, might be influenced by the effect of the outcome on city revenues was enough for this Court to conclude that constitutional rights were jeopardized.

Here, what trial judge could put out of his mind the "possible temptation" to deny a motion for recusal because a grant of such a request may subject him to contempt proceedings? The analysis of the need for discretion by the sentencing judge, even where a mandatory sentence is being imposed, amply demonstrates the necessity for a disinterested and impartial judge in the proceedings over which Judge Bontrager was presiding. To permit the punishment of a judge for recusing himself under these circumstances burdens the remedy of recusal to such an extent that the defendant's right to an impartial judge is jeopardized.

The impact of this ruling may have already been felt beyond the borders of Indiana. If a trial judge who feels he cannot be impartial is not permitted to recuse himself, what other alternative is available for one who follows his conscience, except to resign from the bench? The resignation of New Mexico District Judge Gene E. Franchini provides a dramatic example. See "Judge Quits Rather Than Sentence Man to Prison," Los Angeles Times, Part I, Septem-

ber 30, 1981. What a sad loss it will be to our system of criminal justice if the only choices given to conscientious trial judges are violate your conscience, be held in contempt, or resign.

Conclusion.

California Attorneys for Criminal Justice and the National Association of Criminal Defense Lawyers, Inc. join Petitioner in respectfully praying that a Writ of Certiorari to the Supreme Court of Indiana be granted.

Respectfully submitted,

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